IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1539

STEPHEN K. EASTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutional Provisions, Statutes and Other Authorities:

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The petitioner, Stephen K. Easton, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 27, 1978.

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto at pages A-1 to A-17. No opinion was rendered by the District Court for the Southern District of New York determining petitioner's motion to set aside the verdict. The District Court did render an opinion respecting the similar motion of two co-defendants, which opinion appears in the Appendix hereto at pages A-18 to A-23.

Jurisdiction

The judgment of the Court of Appeals was entered on March 27, 1978. The jurisdiction of this Court to review that judgment rests on 28 U.S.C. § 1254(1).

Questions Presented

1. May a partial jury verdict stand where two jurors, during jury deliberations but after the partial verdict has been rendered, advise the Court that the verdict was not unanimous, that they surrendered their honest conviction of petitioner's innocence, and that they were coerced because "incredibly attacked personally"? This question presents novel, unresolved and important issues concerning the interpretation and administration of Rule 606(b) of the Federal Rules of Evidence and Rule 31(b) of the Federal Rules of Criminal Procedure.

2. Where during a private interview with and instruction of two jurors during deliberations the Court directed the jurors to raise their questions anew with the jury for redeliberation and stated that the Court would question the jurors again, did the Court coerce the rendering of a verdict on Count Two and err in rendering a private instruction, by failing to instruct the entire jury to deliberate anew, failing to call for the jury's verdict again and failing to repoll the jury? This issue is discussed in Points I B and C, II and III of that section of this petition which sets forth "The Reasons For Granting The Writ".

3. Where the redacted indictment charged four defendants with twenty-four crimes, the trial endured over thirty days, sixty-nine witnesses were heard and fragmented verdicts taken, was petitioner's right to poll the jury denied when the jury was polled on Count One as to all defendants

collectively rather than as to each individually? This issue is discussed in Point III of that section of this petition which sets forth "The Reasons For Granting The Writ".

4. (Were so many prejudicial errors committed in admitting testimony as to petitioner's alleged commission of a wholly unrelated crime and as to petitioner's financial condition that petitioner was denied due process, as a matter of law?) This issue is dealt with in Point IV of that section of this petition which sets forth "The Reasons For Granting The Writ".

Constitutional and Statutory Provisions Involved

United States Constitution Fifth Amendment:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

United States Code, Title 28:

Federal Rules of Evidence, Rule 606(b):

> *"Inquiry into validity of verdict or indictment.* Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was brought to bear upon any juror. Nor may his affi-

davit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes."

United States Code, Title 18:

Federal Rules of Criminal Procedure, Rule 31(b):

"Several Defendants. If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again."

Federal Rules of Criminal Procedure, Rule 31(d):

"Poll of Jury. When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to return for further deliberations or may be discharged."

Statement of the Case

Petitioner seeks review of a judgment of the United States Court of Appeals for the Second Circuit (A-1) which affirmed a judgment of the District Court for the Southern District of New York finding petitioner to be guilty on Counts One and Two of a twenty-four count indictment, sentencing petitioner to imprisonment for six months and fining him $5,000 on Count One, suspending sentence on Count Two and imposing probation (A-22).

A. Introductory Statement

Petitioner, Stephen K. Easton ("Easton" and "petitioner"), a certified public accountant, together with co-defendants William H. Hockridge ("Hockridge"), Charles Petri ("Petri"), George Flynn ("Flynn"), George Whitney ("Whitney") and Charles Rapport ("Rapport")[1] were charged with twenty-four counts of misconduct occurring in 1971 and 1972

The first count charged conspiracy to violate 18 U.S.C. §§ 656, 1005 and 1014 (1970). The second count charged that Hockridge, an assistant vice-president and loan officer of the Chemical Bank, misapplied funds of that bank obtained by unsecured loans and that Petri, Flynn, Whitney and Easton, alleged principals of the corporate borrowers, aided and abetted such misconduct (18 U.S.C. §§ 656 and 2 (1970)). Counts Three through Seventeen charged the defendants with making false financial statements with respect to the various alleged shell corporations for the purpose of influencing the Chemical Bank and Bank of New York to make certain loans (18 U.S.C. § 1014 (1970)). Counts Eighteen through Twenty-Four charged that Hockridge, aided and abetted by the remaining defendants except Rapport, made false entries in the books of the Chemical Bank (18 U.S.C. § 1005 (1970)).

All defendants but Whitney entered pleas of not guilty.

The trial of this complex multi-defendant matter before a jury commenced on December 2, 1976, with the Honorable Dudley B. Bonsal presiding, and continued until 34 days thereafter when the jury was discharged, after rendering verdicts on thirteen counts. Forty-three government and twenty-six defense witnesses were heard.

1. Rapport was severed just prior to summations. Count Six of the Indictment was dismissed at the time of severance.

The jury found Hockridge and Easton guilty on Counts One and Two (hereinafter also the "conspiracy" and "misapplication" counts). Easton was found not guilty on all counts relating to the making of false financial statements. Petri was found guilty on Counts One, Two and Eight. Flynn was acquitted on all counts.

Easton's role in the matter was essentially ministerial. Easton was not a "principal" of the corporate borrowers. He was a relatively minor financial officer thereof.

B. Evidence of Jury Misconduct

On the morning of the fifth day of the trial, the Court received a note from Juror Number Three (A-6). The Judge interviewed the juror in chambers and she revealed that the jury had been improperly discussing the case during recesses and that:

> "[T]he people in the jury are not giving these people [defendants] a fair chance . . . several of the people have expressed their opinion that these people are guilty." (T. 566).[2]

The Court dismissed the juror's comments stating:

> "I don't think it is serious and I think this is the normal reaction of a young perhaps little idealistic girl . . . ." (T. 570).

Defendants moved for a mistrial on the ground of jury bias. The motion was denied (T. 570). The Court later determined to interview the other jurors (T. 627). The interviews were brief. The Judge prefaced his inquiry by reminding each juror of the obligation not to discuss the case, an admonition clearly tending to discourage revelation of misconduct (T. 688-727).

2. Parenthetical references in the form "(T.)" are to the pages of the transcript below.

During the interviews seven other jurors and two alternates indicated they had heard jurors express opinions as to defendants' guilt (*see, e.g.*, T. 696). The motion for a mistrial was renewed (T. 730-1) and denied (T. 736).

Substantial misconduct also occurred during the jury deliberations. Throughout the morning of Friday, February 11, 1977, the Court charged the jury. At 4:45 p.m. the jury asked to hear the charge concerning the elements of a conspiracy again (T. 5864), and the charge was repeated.[3] The jury concluded deliberations at 9:30 p.m. (T. 5877). They had not reached any verdict (A-7).

Deliberations resumed Monday, February 14, 1977. The jury requested further exhibits (T. 5880) and was read portions of Easton's testimony and testimony of a bank officer concerning conversations had with Easton relating to one loan (T. 5882-3). At 6:30 p.m. the jury upon inquiry by the Court reported that it had reached a verdict as to three defendants on Count One of the indictment. Over objection, the Court heard the partial verdict finding Hockridge, Petri and Easton guilty (A-8) (T. 5961-2). At defendants' request the jury was polled; *however, each juror was not polled separately as to each defendant.*

The following day, the jury heard further excerpts from the testimony and received further exhibits (T. 5907-9). No further verdicts were rendered. At 5:00 p.m. the Judge revealed for the first time that *that morning* he had received a note from Juror Number Four requesting to see him; the Judge determined not to interview the juror (T. 5909-15).[4] The jury was discharged for the day.

3. Prior thereto, the jurors had requested that certain exhibits be transmitted to them (T. 5862, 5863), including evidence admitted subject to connection (*e.g.*, T. 5863, 5880, 5901, 5908-9).

4. The Second Circuit opinion recites that the note was received at 5 p.m. (A-8). The record indicates the note was received earlier, but the receipt only revealed by the Court at 5 p.m.

The next day, February 16, 1977, at 10:00 a.m. the Court revealed to counsel his receipt of a note from Juror Number Three (A-8) (T. 5920-8). The note read:

> "Judge Bonsal, please see me as soon as possible this morning. *I feel that I have committed a grave injustice. Inasmuch as I let myself be led or rushed for lack of a better word into agreeing with the verdict of the jury.*" (T. 5920) (emphasis added).[5]

The Court determined to interview Jurors Number Three and Four, rather than immediately setting aside the partial verdict, to "see [if he could find] any way of salvaging this thing" (T. 5921).[6] Concerning the interview, the Court stated:

> "I am not going to let it [the Count One verdict] stand if I am satisfied that this lady as she says it was pressured into doing it." (T. 5923).

The Court interviewed the two jurors in chambers. Counsel were not present. The jurors indicated that their comments were directed to the partial conspiracy verdict (T. 5928).

At first, Juror Number Three indicated that her comments were with respect to all three defendants (T. 5928). She indicated she felt the evidence insufficient as to Hockridge and Petri (T. 5928-9). As she began to speak about Easton, the Court interrupted and turned his inquiry to

5. The jury was separated during the deliberations. On the morning of February 16, 1977 the New York Daily News reported the partial verdict, identifying the United States Attorney's Office as its source (T. 5924).

6. Later he stated: "I hope that in some way that [the interview] might salvage the situation" (T. 5923). However well-intended, the Trial Judge's view that harassment of a juror, precluding him and her from rendering an independent and honest verdict, could be cured or "salvaged" by a subsequent private judicial interview can hardly be justified.

Juror Number Four. She indicated that during the deliberations she "was personally attacked incredibly by two members [of the jury]" (T. 5929). The Court refused to permit her to describe the nature of the attack (T. 5930).

Juror Number Four indicated that ultimately she became secure in the guilty verdict respecting Hockridge and Petri (T. 5930). However, as to Easton, she indicated that she, and several other jurors, were:

> "[R]ailroaded, you know, before we could bring up our doubts . . . I know that at the time when we were polled that I should have said no." (T. 5930-1).[7]

The Court then turned to Juror Number Three and stated to her:

> "*[Y]ou have had sort of an emotional problem with this thing here, haven't you?*
>
> "JUROR No. 3: It can be an emotional problem but the question in my mind is the reasonable doubt . . . [instruction as to reasonable doubt omitted].
>
> "THE COURT: I think what I would like to do is this. You know, I mentioned to you when I charged you I don't want you ever to surrender your honest convictions because of other jurors.
>
> "JUROR No. 3: That is what I did.
>
> "THE COURT: You *think* you did." (T. 5931) (emphasis added).

The Court's comments plainly deprecated the jurors' concern about the want of unanimity. Rather than confronting the strong-arm tactics of some of the jurors, the Court left the situation unresolved, apparently in the inter-

7. In fact, she had no opportunity to do so, since the poll was not conducted individually as to each defendant (T. 5945).

est of salvaging the verdict in this lengthy trial. The Judge instructed the two jurors:

> "I would like you to think about that [the conspiracy verdict] and resume your deliberations and then we'll see how it goes today with the deliberations and then perhaps after we finish here I will want to see you again.
>
> "JUROR No. 3: *I don't understand what you mean. Continue the deliberating—*
>
> "THE COURT: After the jury finishes, I think I will want to see you again and talk again about some of these things that you have told me this morning. But I think it would be wise if both of you could go back with the jurors.
>
> "You have got a problem and you do the same thing with respect to Mr. Easton. Think that one over pretty carefully . . . .
>
> • • •
>
> "JUROR No. 4: I know there is one other member too who feels that way too.
>
> "THE COURT: About what?
>
> "JUROR No. 4. I think about all three actually. But I think specifically about Easton also.
>
> "THE COURT: All right. Why don't you go back then and let's see where we go today and I'll follow this up.
>
> • • •
>
> "One other thought. When you go back with the jury and when you think it is an appropriate time, you raise your points again with the jury about what you think about what they have done and see what they think about that and have an exchange on that." (T. 5932-4) (emphasis added) (*see* A-9).

The two jurors were sent to resume deliberations.

Defendants moved for a mistrial (T. 5935). Easton's motion was never formally decided.

At no time following the private instruction did the Judge charge the jury as a whole to deliberate anew as to Easton, as he had charged the two jurors. The jury was never advised of the substance of the Court's private interview.

At 2:30 p.m. of the day of the interview, the jury found Flynn not guilty on Count One (T. 5955). Further requests for evidence and testimony relating to Easton were made.

The following day at 2:00 p.m., after spending much of the morning hearing testimony read, the jury returned a further partial verdict, finding Hockridge, Petri and Easton guilty on Count Two, Flynn not guilty on Count Two, and all defendants not guilty on substantive Counts Three and Four (T. 5968-70).

Thereafter, the jury rendered verdicts on Counts Eight, Ten, Eleven, Twelve, Thirteen, Fourteen, Twenty and Twenty-one; Easton was found not guilty on all counts (A-10).

A verdict finding all defendants not guilty on Count Seventeen was thereafter rendered (T. 6021).

After six days of deliberation the jury was discharged (T. 6022-3) and the Court thereafter dismissed the remaining counts.

The Judge never met with Jurors Number Three and Four again. The jury was never instructed to redeliberate as to Easton. The Judge did not repoll the jury as to Count One. The Judge did not permit Jurors Number Three and Four to alter their verdict as to Easton.

Easton was sentenced on June 15, 1977. Apparently, the Court had determined to deny his motion for a mistrial and to set aside the verdict, although no formal decision was rendered.[8]

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8. A formal decision was rendered with respect to a similar motion by Hockridge and Petri. The Court wrote that it was "satisfied that neither of the two jurors surrendered their honest convictions" (A-19).

C. Summary of Evidence Concerning Easton

The essence of the prosecution's case against Easton was that he, although a low-salaried part-time employee, was in charge of "creating" the financial statements which were submitted to the banks in order to induce the loans.[9] All but two of the statements were unsigned and none was signed by Easton. All were unaudited. The only direct evidence that Easton authored the statements was offered by Robert Fillet, an unindicted co-conspirator promised immunity by the government. Fillet, financial consultant for the borrowing companies, was paid a salary three times that of Easton. Fillet's trial testimony substantially contradicted that given by him to the Grand Jury.

The financial statements were admitted, over objections as to lack of authentication and hearsay, subject to connection. At no time prior to the charge was the jury instructed as to the meaning of this ruling, nor did the Court advise the jurors as to which, if any, of the financial statements had been connected by the testimony.[10]

The evidence that Easton occupied a position of managerial responsibility for Petri's companies was meager. No less than seven government witnesses employed by one or more of the companies listed only Petri and Flynn as their "bosses".

Petri, not Easton, was identified as the individual negotiating loans with Hockridge at Chemical Bank (T. 1208). Petri was identified as Easton's "boss" (T. 1302). Em-

9. Easton was found not guility on each of the counts relating to the financial statements. The Second Circuit wrote that Easton prepared all but two of the financial statements (A-4). This is inconsistent both with the jury's verdict and the evidence, which failed to demonstrate authorship of any of the statements but the two which Easton admitted preparing.

10. During its deliberations, the jury made repeated requests for this evidence (*see, e.g.*, T. 5880-3).

ployee-witnesses repeatedly stated that Easton's authority was limited (T. 1325). One secretary stated, "He was more like a bookkeeper" (T. 1325). Witnesses repeatedly testified that Easton often complained of his lack of knowledge of the companies' dealings (T. 1329, 1237). Easton was described by his co-workers as Petri's "pawn" (T. 1538) and "naive" (T. 2657).

Easton's salary was commensurate with his position as an inferior. Petri's chauffeur earned more than he (T. 1389).

As if in recognition of the paucity of competent evidence proving Easton's involvement, the government sought to introduce irrelevant and prejudicial matter concerning Easton.

Thus the government repeatedly elicited testimony, over objection, that Easton permitted other employees to receive salary payments without withholding taxes, although no such crime was charged in the indictment (*see, e.g.*, T. 642, 839, 1008, 2183). The Court permitted such testimony, without explanation (*id.*). Similarly, during the cross-examination of Easton, the government questioned Easton extensively concerning his personal finances and particularly as to the fact that Easton's net worth had increased from approximately $170,000 in 1972 to approximately $3 million in 1974 — two years after the period covered in the indictment (T. 5033-4).

The Assistant United States Attorney also repeatedly charged in his summation that during the relevant period Easton was "lacing his pockets with cash" (T. 5416), an allegation he supported with reference to Easton's increased net worth in 1974 (T. 5428-9), an increase in fact traceable to Easton's private business ventures after resigning from the Petri companies (T. 5109-14).

Easton, 41 years of age at the time of trial, took the stand in his own defense, as did twelve character witnesses, each of whom had dealt with Easton in business and professional matters. One testified that his factoring company had made loans aggregating approximately $1 million to Easton or companies in which Easton had an interest, all of which were timely repaid (T. 4763-4). Easton testified that all of his substantial personal and unrelated business loans in 1971 and 1972 had been timely repaid (T. 4582-4, 4515-6, 4537-8).

Easton testified that he was only a part-time employee of the Petri companies (T. 4598), because involved at the time in outside business ventures as well. He reported to Fillet (T. 4599). Easton denied preparing any of the relevant financial statements (T. 4614-40). He conceded preparing, at Fillet's and Petri's request, certain *pro forma* statements and projections (T. 4611), which, in each instance, he turned over to Fillet or Petri (T. 4615). In each instance, the figures were based upon data given to him by Fillet or Petri (T. 4615), not upon an examination of the relevant corporate records (*id.*). In each instance the statements were labelled as either *pro forma* financial statements or projections (T. 4616).

Hockridge, the Chemical Bank loan officer, confirmed Easton's non-involvement, testifying that he received all relevant financial data from Petri (T. 3543).

In an effort to shore up the obviously weak case against Easton, the Assistant United States Attorney devoted virtually his entire summation to Easton. One hundred of the one hundred thirty-five pages of the stenographic transcript of the oral summation containing the portion which discussed the alleged culpability of the individual defendants focused upon Easton (T. 5345-5441, 5304-6, 5316-9, 5333-4), and only thirty-five pages in the aggregate focused

upon the other three defendants, although they were the principals (T. 5322, 5472, 5320-22, 5465-73, 5441-65).

The Court's charge to the jury included a general direction that the jury could consider evidence admitted subject to connection only if it found the government had proven a conspiracy (T. 5818-19). The specific and numerous exhibits so admitted were not enumerated, nor was the jury instructed that it must find the existence of such a conspiracy based only upon non-hearsay evidence. The jury reviewed such evidence in connection with deliberations on Count One.

On March 27, 1978 the Court of Appeals for the Second Circuit affirmed the judgment of conviction against Easton, Hockridge and Petri. Hockridge and Petri have moved that Court for rehearing.

Reasons for Granting the Writ

I.

Novel Issues Concerning the Interpretation and Administration of Rule 606(b) of the Federal Rules of Evidence and Rule 31(b) of the Federal Rules of Criminal Procedure are Presented By the Pre-Discharge Court-Juror Interview Revealing Misconduct and Lack of Unanimity.

The Second Circuit ruled that the principal issue presented to it was a novel question concerning the interpretation and interplay of Rule 606(b) of the Federal Rules of Evidence (hereinafter "F.R.E.") and Rule 31(b) of the Federal Rules of Criminal Procedure (hereinafter "F.R.Cr.P.") which "[n]either the cases nor the treatises definitively answer . . . ." (A-11). That issue is whether F.R.E. Rule 606(b) renders incompetent the voluntary

statements of jurors made to the Court after a partial verdict is rendered but while deliberations are continuing, which statements evidence jury misconduct and lack of unanimity[11] regarding the partial verdict. Petitioner believes the issue to be one of substantial importance in the administration of justice by the federal courts, by reason of the frequency with which judges at trial permit partial verdicts to be taken.

The District Court at bar, ruling upon Hockridge's and Petri's motions to set aside, did not address the question squarely, finding that the jurors had not surrendered their honest convictions (A-19). Juror Number Three, however, *expressly* stated that this was the case (T. 5931). The Court of Appeals held F.R.E. Rule 606(b) applicable to partial verdicts and notwithstanding the jurors' statement of coercion and lack of unanimity permitted the conviction to stand.

A. The Evidence Was Competent

F.R.E. Rule 606(b), set forth *supra*, pp. 3-4, renders certain evidence incompetent to impeach a jury verdict.

While recent cases and legislative history indicate that Rule 606(b) is intended (a) to protect jurors from post-discharge harassment, minimize the risk of jury tampering, and secure the privacy of deliberations, and (b) to promote the finality of verdicts, *e.g., Government of Virgin Islands* v. *Gereau,* 523 F.2d 140, 148-50 (3d Cir. 1975), *cert. denied,* 424 U.S. 917 (1976), American Bar Association, *Standards Relating To: Trial by Jury* (Approved Draft 1968), Commentary to § 5.7(a) (hereinafter "ABA, *Standards Relating to Trial by Jury*"), only the former reasons are cited in the seminal decisions of this Court.[12]

11. Unanimity is, of course, a non-waivable constitutional mandate, under the Sixth Amendment and under F.R.Cr.P. Rule 31(a). *See Apodaca* v. *Oregon,* 406 U.S. 404 (1972). However, the clear effect of the Second Circuit's decision in the instant case is to impose a constitutionally improper waiver of the unanimity rule, during the course of jury deliberations.

For example, in *McDonald* v. *Pless,* 238 U.S. 264 (1915), articulating the rule in a civil action, the Court wrote that absent such a rule:

> "Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct . . . . [T]he result would be to make what was intended to be a private deliberation, the constant subject of public investigation . . . ." *Id.* at 267-8.[13]

Only one reported decision, apart from the instant matter, has been found addressing the issue of whether F.R.E. Rule 606(b) applies to impeachment prior to jury discharge but after a partial verdict has been rendered under F.R.Cr.P. Rule 31(b). The legislative history and language of the Rule are silent.

In the reported decision on point, the Third Circuit declined to decide the issue. This was *Vizzini* v. *Ford Motor Company,* 72 F.R.D. 132 (E.D. Pa. 1976), *vacated and remanded on other grounds,* 569 F.2d 754 (3d Cir. 1977). In a bifurcated civil trial, the District Court had declared a mistrial as to damages but held F.R.E. Rule 606(b) a bar to reception of evidence to impeach the liability verdict. The evidence, unearthed during deliberations

12. The rule was initially premised upon the maxim that no person shall be allowed to allege his own turpitude. *Vaise* v. *Delaval,* I Term Rep. 11, 99 Eng. Rep. 944 (K.B. 1785). However, that doctrinal basis has since been discarded. 8 Wigmore, *Evidence* § 2352 (McNaughton ed. 1961); ABA, *Standards Relating to Trial by Jury,* at 168.

13. This Court has always stated that no inflexible rule can be laid down because: "[C]ases might arise in which it would be impossible to refuse them [evidence from jurors impeaching a verdict] without violating the plainest principles of justice." *United States* v. *Reid,* 12 How. 361, 366 (1851).

as to damages, indicated that the previously rendered verdict as to liability was the result of compromise. 72 F.R.D. at 136. On appeal, the Third Circuit vacated and remanded, ruling that the issues of liability and damages were so intertwined as to require a new trial on both questions. The Court specifically declined to determine whether Rule 606(b) was applicable under the circumstances. 569 F.2d at 762, n.2.

In the case at bar, evidence was placed before the Court on the fifth day of trial that numerous jurors entertained pre-conceived notions of the defendants' guilt. This, in itself, constituted grounds for declaration of a mistrial. *Cf., Clark* v. *United States,* 289 U.S. 1 (1933); *Irvin* v. *Dowd,* 366 U.S. 717 (1961).

The Circuit Court at bar perceived that "freedom of jury deliberations is less threatened by impeachment of partial verdicts . . . ." (A-12). The Court found, however, that petitioner desired "scrutiny of the deliberations." This is inaccurate. The evidence of want of unanimity was voluntarily placed before the Court by jurors. No "scrutiny" was necessary or appropriate. Rather, given the facts revealed, the appropriate remedy would have been either to set the verdict aside or to request the jury to deliberate further. *See* pp. 22-23, *infra.*[14]

The Second Circuit principally based its holding that F.R.E. Rule 606(b) was applicable upon the reasoning that the interest in verdict finality "would be enhanced by *extending* the rule against impeachment to partial verdicts . . . ." (A-13) (emphasis added).

While the catchphrase "verdict finality" appears in many recent enunciations of the no-impeachment rule, the precise interest has never been defined. Petitioner suggests there

14. The Trial Judge's instructions to the jurors, which the Second Circuit termed "somewhat ambiguous" (A-15, n.20), indeed suggested redeliberation. The jury as a whole, however, was not so charged.

is no interest in verdict finality *per se,* but rather that the term exists only to establish that point in time, or judicial act, after which impeachment by certain types of evidence will be prohibited, in the interests of protecting jurors from harassment and preserving the secrecy of the deliberative process.

Numerous decisions and learned commentators have indicated that the no-impeachment rule relates to evidence obtained *after* the jury is discharged. These opinions conflict with the ruling below. *See United States* v. *Chereton,* 309 F.2d 197, 200 (6th Cir. 1962), *cert. denied,* 372 U.S. 936 (1963); *United States* v. *Schroeder,* 433 F.2d 846, 851 (8th Cir. 1971), *cert. denied,* 400 U.S. 1024 (1971); *Cherensky* v. *George Washington-East Motor Lodge,* 317 F. Supp. 1401 (E.D. Pa. 1970). As Professor Moore stated:

> "[P]rior to the jury's discharge there is nothing in the policy underlying the no-impeachment rule, presently considered, to preclude a juror from testifying relative to misconduct or other matters that might vitiate the verdict." 6A Moore's *Federal Practice* ¶ 59.08[4], at 59-143 (2d ed. 1974).

Similarly, Wigmore writes:

> "The reasons for the foregoing rule, namely, the dangers of uncertainty and of tampering with jurors to procure testimony, disappear in large part if such investigation as may be desired is *made by the judge* and takes place *before* the jurors' discharge and separation." 8 Wigmore, *Evidence* § 2350, at 691 (McNaughton ed. 1961) (emphasis in original).

See also 3 Weinstein's *Evidence* ¶ 606[04], at 606-28 (1975); ABA, *Standards Relating To Trial By Jury,* Commentary to § 5.7, at 137: "Finally, it should be emphasized that the restrictions in Section 5.7(a) apply to inquiry after the jury has been discharged . . . ."

Where, as in the instant case, jury bias has manifested itself prior to deliberations, there is particular reason to admit and consider pre-discharge record evidence of further misconduct. *See* 3 Weinstein's *Evidence* ¶ 606[04], at 606-35 (1975); *Clark* v. *United States,* 289 U.S. 1 (1933).

Moreover, where evidence is offered, *inter alia,* to prove that no unanimous verdict was rendered, it has repeatedly been held admissible. *Fox* v. *United States,* 417 F.2d 84 (5th Cir. 1969); *cf., Grace Lines, Inc.* v. *Motley,* 439 F.2d 1028 (2d Cir. 1971), discussed *infra,* p. 21.

Jorgensen v. *York Ice Machinery Corporation,* 160 F.2d 432 (2d Cir. 1947), supports the interpretation of Rule 606(b) urged by petitioner. In *Jorgensen,* although the Court declined to set aside the civil verdict where there was evidence the verdict was achieved by compromise, the Court accepted as evidence the post-discharge juror affidavits, noting that:

> "[J]udges again and again repeat the consecrated rubric [the no-impeachment rule] which has so confused the subject; it offers an easy escape from embarrassing choices." *Id.* at 435.

The undeniable interest in establishing the point in the judicial process after which impeachment by certain types of evidence will be prohibited is not impaired by permitting impeachment prior to discharge. Where the jury is sequestered, harassment is unlikely. Separation during deliberations is rarely permitted, 8A Moore's *Federal Practice* ¶ 31.06, at 31-47, 31-48 (1977 Revision), and under some circumstances may be plain error. *See United States* v. *Breland,* 376 F.2d 721 (2d Cir. 1967). In addition, if pre-discharge impeachment were permitted, any inquiry would be made by the judge with due avoidance of protected areas. 8 Wigmore, *Evidence* § 2350, at 691 (McNaughton ed. 1961).

B. There Was Sufficient Evidence of Misconduct And Lack of Unanimity At Bar.

In *Grace Lines, Inc.* v. *Motley,* 439 F.2d 1028 (2d Cir. 1971), a juror responded during polling: "Yes, it [the verdict] had to be unanimous." *Id.* at 1030. The Court promptly declared a mistrial. In reversing, the Circuit Court stated:

> "While it may be argued that Juror No. 11's explanation implied a disagreement with the verdict, there is not sufficient [sic] in the record to warrant this conclusion. . . . *There is nothing to indicate that she was surrendering a conscientious conviction.*" *Id.* at 1032 (emphasis added).

By necessary implication, where there is evidence that jurors surrendered their honest convictions, a mistrial must be declared.[15]

In *United States* v. *Pleva,* 66 F.2d 529 (2d Cir. 1933), the jury had deliberated for one and one-half days when an elderly juror stated in open court that he was ill and that he doubted that a conspiracy had been proven. A doctor examined the juror and found him sufficiently healthy to continue deliberations. A second doctor examined the juror, with the same result. Arrangements were made for deliberations to be held under conditions minimizing the juror's pain. Several hours later, a verdict was rendered. *After* the jury had been polled, the juror indicated that he had assented because he felt unable physically to hold out his dissenting opinion.

In reversing, the Circuit Court wrote:

> "No person may lawfully be convicted by a jury unless every juror actually agrees that upon the evi-

15. Indeed, the Trial Judge at bar so indicated when he stated prior to the interview with the jurors: "I am not going to let it [the verdict] stand if I am satisfied that this lady as she says it was pressured into doing it. Don't worry about that." (T. 5923).

dence and the law of the case that person is guilty. If a verdict of guilty is returned for any other reason, it is a perversion of the constitutional guaranty to a jury trial." *Id.* at 532.

At bar, at least two jurors indicated that they never actually agreed that Easton was guilty and that they were never persuaded "on the merits." *Pleva, supra* at 533. *See also United States* v. *Grieco,* 261 F.2d 414 (2d Cir. 1958), *cert. denied,* 359 U.S. 907 (1959); *Kingsport Utilities, Inc.* v. *Lamson,* 257 F.2d 553 (6th Cir. 1958); *Fox* v. *United States,* 417 F.2d 84 (5th Cir. 1969) (one juror stood mute during the polling; the Court remanded for a new trial on the ground that no unanimous verdict had been reached).[16]

This result is inevitable in the instant situation in view of the non-waivable constitutional mandate requiring unanimity of verdict. *Apodaca* v. *Oregon, supra; Andres* v. *United States,* 333 U.S. 740 (1948).

C. At The Least, The Jury Should Have Been Directed To Redeliberate.

In *Grace Lines, supra,* the Second Circuit held that under the circumstances, and even though there was no evidence the juror surrendered her conscientious conviction, the Court should have sent the jury back for further deliberations. *Id.* at 1032. Similarly, in *Williams* v. *United States,* 419 F.2d 740 (D.C. Cir. 1969) (*en banc*), during the polling, one juror indicated confusion. The Circuit Court approved the Trial Judge's action in sending the jury back to redeliberate. *Accord, United States* v. *Fox,* 488 F.2d 1093 (5th Cir. 1973), *cert. denied,* 417 U.S. 948 (1974); *United States* v. *Sexton,* 456 F.2d 961 (5th Cir. 1971); *Cook* v. *United States,* 379 F.2d 996 (5th Cir. 1967); *Bruce* v. *Chestnut*

16. In *Fox,* the Court found juror affidavits admissible to prove the absence of unanimity.

Farms-Chevy Chaise Dairy, 126 F.2d 224 (D.C. Cir. 1946); F.R.Cr.P. Rule 31(d).

It is submitted that the trial Court erred in failing to direct redeliberation. Although during its colloquy the Court directed Jurors Number Three and Four to consider the question of Easton's guilt *de novo* with the rest of the jury, no such instruction was given to the other jurors or to the jury as a whole, and the jury was never polled again as to Easton's guilt on Count One before being discharged. The jury not having been so instructed and no further poll having been taken, reversal is mandated.[17]

II

Opinions Expressed By The Second Circuit In The Instant Case Conflict With The Opinions Of Other Circuits In Vital Areas Concerning The Administration Of Criminal Justice.

A. The Court Declined to Rule Upon The Propriety Of A Trial Court's Private Instruction of Jurors.

As set forth at pp. 8-11, *supra,* the Trial Judge gave private instruction to Jurors Number Three and Four. Petitioner contended before the Second Circuit that such private instruction was prejudicial error. This point, raised by petitioner below, was not addressed in the Circuit Court's opinion. Therefore, that court must be deemed to have approved the procedure of a private interview and

17. The Second Circuit determined that petitioner waived this objection by failing to request a further poll prior to discharge (A-15, n.20). However, the motion to set aside was then before the Court and just prior to discharging the jury the Court indicated no further objections or motions in that connection were necessary (T. 6020). The Circuit Court also placed unwarranted emphasis upon the fact that the jurors did not again voice their reservations (A-14). However the jurors expected the Judge to speak with them again, as he had promised, and, when the jury was discharged without such interview, the two jurors again sought to speak with the Court.

instruction, as to a vital issue in the trial, under circumstances where the procedure was harmful to petitioner, as a defendant.

A contrary rule has been enunciated in the Third and Fourth Circuits. In *United States* v. *Gullia,* 450 F.2d 777 (3d Cir. 1971), one defendant was charged with eleven counts and the other with one count of aiding and abetting a bank teller in embezzling funds from her employer and with obstruction of the FBI investigation thereof. The trial lasted fourteen days. Deliberations commenced on a Friday. The Judge, who was required to be out-of-town, left instructions that any verdict reached should be sealed. A sealed verdict was returned at 7:35 p.m. When the Court reconvened the following Monday, and during the reading of the verdict, one juror interrupted and asked to speak with the Judge. The Judge consulted counsel, who approved of the Court's intention to interview the juror.

All counsel were present during the interview. The reviewing court summarized the transcript of the interview as follows:

> "[T]he juror had agreed to the sealed verdict with some reluctance; the juror, in the interim, had discussed the case and the verdict with her husband; the juror had some religious scruples about sitting in judgment upon another; the juror had been unable to sleep since the verdict was sealed . . .; the trial judge correctly instructed the juror, again and again, during the conference upon the meaning of 'aids, abets, counsels, commands, induces or procures'; . . . in response to the juror's question ' . . . [w]hat would happen, Judge, if I held out?', the trial judge answered: ' . . . [i]t would mean that we have just wasted two weeks, that is all.' Upon objection . . . his revised reply was: 'It would just be a misemployment of time.'" *Id.* at 778-9.

Thereafter, in open court, the Judge repeated his instructions (a) as to aiding and abetting, (b) that the verdict must be unanimous, and (c) that one juror need not be guided by the majority. The jury withdrew to deliberate further. Guilty verdicts were thereafter rendered on all counts as to both defendants.

The Third Circuit reversed and remanded, holding that the Trial Judge erred in privately interviewing the juror, stating:

> "[I]t was not only irregular, but error to give additional instructions to the extent and of the type here given to one juror in the absence of the remaining jurors." *Id.* at 779.

In *United States* v. *Rabb,* 450 F.2d 343 (3d Cir. 1971), *cert. denied,* 405 U.S. 995 (1972), and *Beaty* v. *United States,* 213 F.2d 712, 722 (4th Cir. 1954), *cert. denied,* 348 U.S. 905 (1955), the Third and Fourth Circuits suggested in their opinions that it was improper for the Trial Court to communicate with any individual juror, a rule of law which precludes the giving of private instructions to any individual juror or jurors.[18]

B. The Supplemental Instructions Given By The Trial Judge To Two Jurors Were Tantamount To an *Allen* Charge, As To Use of Which The Circuit Courts Are Divided.

During his interview with Jurors Number Three and Four, the Trial Judge, in his self-identified effort to "salvage" the verdict (T. 5921), at first sought to minimize the jurors' statements of discontent. When Juror Number Four commented that three or four jurors had been rail-

18. In *Beaty,* the Court found the communication with the foreman not to be prejudicial because solely related to a beneficial recommendation as to sentencing.

roaded into a verdict as to Easton (T. 5930-1), the Court abruptly turned to Juror Number Three, indicating that her statements evinced "an emotional problem" (T. 5931). When Juror Number Three indicated that she had surrendered her honest conviction of Easton's innocence, the Court commented "You think you did." (T. 5931). Thereafter, the Court indicated that the jurors should redeliberate as to Easton (T. 5932-3). One can never know whether such redeliberation occurred, as the jury was never again polled as to Easton on Count One.

The impact of the two juror interview was akin to that of an *Allen* charge.[19] The Court's direction that the two jurors continue to deliberate, coupled with the failure to charge the jury at large either to reopen consideration of Count One as to Easton or to give proper deference and regard to their fellow jurors' opinions, particularly when coupled with the Trial Judge's laissez-faire attitude toward the evidence of misconduct among the jurors and their lack of unanimity, may also be likened in coercive effect to an improperly given *Allen* charge. The composite was so coercive as to vitiate the subsequent conviction on Count Two, which followed soon after the private interview.

The Second Circuit itself has directed the exercise of extreme caution in giving *Allen*-type charges. Thus, in *United States* v. *Robinson*, 544 F.2d 611 (2d Cir. 1976), the Court noted that when the Judge is aware of the numerical split of the jury, and the jury is aware of the Court's knowledge, the giving of an *Allen* charge is a "precarious undertaking" because the effect is "unavoidably to add the Judge's influence to the side of the majority . . . ." *Id.* at 620, n.14, *quoting Mullin* v. *United States*, 356 F.2d 368, 370

19. *See Allen* v. *United States*, 164 U.S. 492 (1896). The remaining jurors assuredly were aware that Jurors Number Three and Four had met with Judge Bonsal, as the interview occurred after the jury was assembled on the morning of February 16, 1976 (T. 5920).

(4th Cir. 1966). At bar, the Court was obviously aware of the numerical division and it seems reasonably evident that the jury was also aware of the Judge's knowledge thereof. The return of Jurors Number Three and Four to the jury room, *without* the giving of any instruction to the jury as a whole and *with* the instruction to the two jurors that they resume deliberations is, if anything, more coercive than the rendering of an evenly balanced, supplementary instruction to all jurors. *See United States* v. *Green*, 523 F.2d 229 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976).

The Second Circuit seems to have retained, but only by the "barest margin", the doctrine that the giving of an *Allen* charge may be proper. *See United States* v. *Kenner*, 354 F.2d 780 (2d Cir. 1965), *cert. denied*, 383 U.S. 958 (1966), and *Robinson*, *supra*. The Fifth Circuit follows a similar doctrine, although its key recent decision based its ruling solely upon *stare decisis*, and commented that the charge was inherently coercive. *See United States* v. *Bailey*, 468 F.2d 652 (5th Cir. 1972), *reh. en banc*, 480 F.2d 518 (5th Cir. 1973).[20]

Contrariwise, the Courts of Appeals for the District of Columbia, the Seventh Circuit and Third Circuit have in recent decisions explicitly disapproved the use of an *Allen* charge. *See United States* v. *Thomas*, 449 F.2d 1177 (D.C. Cir. 1971) (the District of Columbia Circuit prospectively abandoned the use of the *Allen* charge (*Id.* at 1187)); *United States* v. *Brown*, 411 F.2d 930 (7th Cir. 1969), *cert. denied*, 396 U.S. 1017 (1970); and *United States* v. *Fioravanti*, 412 F.2d 407 (3rd Cir. 1969), *cert. denied*, 396 U.S. 837 (1969).

20. The Court wrote:

> "We deeply regret being compelled to affirm this conviction. We do so only because we are bound by precedent. [Citation omitted]. Were the choice ours alone to make, we would put an end to the *Allen* charge in a 'quick and not too decent burial' " *Bailey*, 468 F.2d at 669.

The continued use of *Allen* type charges is thus the subject of substantial disagreement among the Circuits. The conflict should be resolved by this Court. Particularly, in light of the coercive impact of the events surrounding the Trial Judge's private interview with two jurors and of the brief time elapsed in deliberations prior to return of the verdict as to Count Two, petitioner urges that the case at bar affords a significant opportunity for reviewing the propriety of an *Allen* charge.[21] Petitioner respectfully suggests that the inherently coercive character of this type of jury instruction raises serious questions as to trial fairness, which this Court should review. It is time to consider for the federal judicial system, as a whole, whether the Fifth Circuit is not correct in its conclusion that this Draconian, nineteenth century procedure should be given its final interment. *Bailey, supra* at 669.

III

Easton Was Denied the Right to A Proper Poll of the Jury.

As stated in *Miranda* v. *United States,* 255 F.2d 9, 17 (1st Cir. 1958):

> "The right of the defendant to have the jury polled, as thus recognized and established by Rule 31(d) [of the Federal Rules of Criminal Procedure], is of ancient origin and of basic importance."

21. In the case at bar, the Court's charge also included a modified *Pinkerton* instruction. *See Pinkerton* v. *United States,* 328 U.S. 640 (1946). This was improper since at the time when the jurors deliberated on Count Two, the conspiracy verdict had not been set aside. Jurors Number Three and Four were under instructions to continue to deliberate. It is quite possible that, in deliberating, the jury applied the *Pinkerton* charge to find Easton guilty on Count Two. In view of the fact that the Count One conviction was not unanimous (*see* pp. 21-22, *supra*), such charge was inappropriate. Hence, the Count Two conviction is subject to serious doubts for this reason as well as the other circumstances set forth herein.

Denial of the right constitutes reversible error. ***Miranda,*** *supra* at 18.

Moreover, as stated in *United States* v. *Mathis,* 535 F.2d 1303, 1307 (D.C. Cir. 1976):

> "Since jury polls are a matter where 'the need for clarity is at its zenith,' *Williams* v. *United States,* 136 U.S. App.D.C. 158, 419 F.2d 740 (1969) (en banc), the court should shape the form of the poll so as to minimize possible confusion by the jurors."

In *Mathis,* the Court further wrote:

> "The form used here — a single poll for multiple [there, two] defendants — may entail risks of confusion, especially in complicated cases. If the same verdict is reached for all defendants, there is the possibility that a single poll would fail to uncover situations where the jury convicted all defendants although only persuaded beyond a reasonable doubt of the guilt of some. Where different verdicts are reached as to various defendants, a single poll could hide a juror's confusion . . . ." *Id.* at 1307.

At bar, the partial verdict as to Count One found Hockridge, Petri and Easton all guilty. The poll taken was as to all defendants collectively. There can be little question that the poll as taken masked confusion. Not only did Jurors Number Three and Four later reveal their dissent from the verdict as to Easton, but Juror Number Four stated:

> "I know that at the time when we were polled that I should have said no . . . on Easton." (T. 5930-1).

In fact, by reason of the form of the polling, *i.e.,* the fact that separate polling was not made of the jurors as to Count One, Juror Number Four had no opportunity to state her true view that Easton was not guilty of this Count.

IV

The Trial Court, by Admitting Into Evidence a Large Amount of Prejudicial and Irrelevant Testimony, Prevented Easton From Receiving a Fair Trial, Thus Denying Him Due Process.

By admitting, over objection, a substantial volume of prejudicial testimony, the Trial Court impaired the ability of the jury to give Easton a fair trial and precluded Easton from receiving a fair trial. These errors, as a matter of law, deprived Easton of due process of law, in violation of the Fifth Amendment. The individual errors may not, separately considered, justify this Court's intervention. Their cumulative effect, however, is so serious as to mandate reversal by this Court in its role as the ultimate administrator of the federal judicial system.

A. The Repeated Admission, Over Objection, Of Evidence Of The Unrelated, Uncharged Crime of Failing To Withhold Taxes Was Prejudicial Error.

The government repeatedly elicited testimony, over objection, that Easton permitted other employees to receive salary payments without withholding taxes (*e.g.*, T. 642, 839, 1008, 2183). The Court permitted such testimony, without explanation. *Id.* No count of the indictment charged the crime of failure to withhold taxes due the federal government (26 U.S.C. § 6671, *et seq.* (1970)). The admission of such testimony was error under F.R.E. Rule 404(b).

In *United States* v. *Modern Reed & Rattan Co.*, 159 F.2d 656 (2d Cir.), *cert. denied*, 331 U.S. 831 (1947), appellants were charged with violation of the Fair Labor Standards Act. The government, in its opening remarks, advised the jury that appellants had in the past pleaded guilty to

an information charging other violations of the Act. Such an allegation was also contained in the indictment. The Second Circuit wrote that "evidence of the commission of a wholly separate and independent crime even though of the same nature is not admissible." *Id.* at 658 (citations omitted). The conviction was reversed.

Recognizing that evidence of other crimes "may severely prejudice the defendant" (*United States* v. *Broadway*, 477 F.2d 991, 994 (5th Cir. 1973)), the Courts have generally required that such evidence be "plain, clear and conclusive". *Id.* at 995. Rule 404(b) of the Federal Rules of Evidence restates both the general prohibition and certain limited exceptions thereto, stating that evidence of other crimes may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident". Where evidence of other crimes is admitted it must:

> "[H]ave a real probative value, and not just a possible worth on issues of intent, motive, absence of mistake or accident, or to establish a scheme or plan." *Morgan* v. *United States*, 355 F.2d 43, 45 (10th Cir.), *cert. denied*, 384 U.S. 1025 (1966).

Reversal is mandated where the prejudicial effect of the admission of evidence of other crimes outweighs its probative value, where no exception to the exclusionary rule is present, or where simply more evidence of the collateral crime is admitted than is necessary to prove intent, etc. *See, e.g., United States* v. *Ostrowsky*, 501 F.2d 318 (7th Cir. 1974).

In the instant situation, the evidence of alleged failure to withhold income taxes had no conceivable bearing upon the crimes charged, nor upon intent, motive, absence of motive, mistake or accident.

Evidence of commission of another crime is presumed to have been prejudicial. *Bradley* v. *United States,* 433 F.2d 1113 (D.C. Cir. 1969). The repeated admission of such evidence was plainly erroneous.

B. The Admission Of Evidence Indicating That Easton's Net Worth Was Substantially Increased Two Years After The Occurrence Of The Charged Crimes Fatally Tainted The Conviction.

During the cross-examination of Easton, the government questioned Easton extensively concerning the fact that his net worth had increased from approximately $170,000 in 1972, the period covered in the indictment, to approximately $3 million in 1974 (T. 5033-4).

In summations, the government, with sole reference to this fact, repeatedly charged that throughout the period covered by the indictment Easton was "lacing his pockets with cash" (T. 5416). However, the undisputed testimony was that the increase derived entirely from Easton's private, unrelated and wholly subsequent business ventures.

Easton was a subordinate employee of the borrowing corporations. The plain and patently improper purpose of introducing the testimony regarding his apparent after-the-fact increase in net worth was to prejudice the jury, by implying that Easton was a concealed principal in the borrowing corporations or had improperly benefited personally as a result of their misconduct. There was no evidence that Easton derived personal benefit from the loans made to the corporate borrowers.

In *United States* v. *Robinson,* 544 F.2d 611 (2d Cir. 1976), appellant contended the Court erred in admitting testimony concerning a .38-caliber handgun found in his possession ten weeks after a robbery in which several guns, including a .38, were allegedly used. When it admitted this evidence, the Trial Court instructed the jury as to its limited probative value. In reversing, the Circuit Court noted that the Federal Rules provide for exclusion of conceivably relevant

testimony, the probative value of which is outweighed by the danger of unfair prejudice. The Court found the probative value of the evidence to be slight, because the jury would, in order to rely thereon, also have to find that Robinson owned the gun at the time of the robbery, that a .38 was used in the robbery, and that Robinson's gun was in fact used. *Id.* at 616-7. The Second Circuit found the possibility of prejudice substantial and reversed.

At bar, the evidence of Easton's increased worth had no probative value whatsoever. The indictment did not charge that Easton utilized loan funds for personal ends. Even if Easton had received and retained such funds, such fact would have been reflected in his 1972, not 1974, net worth.[22]

The prejudicial effect of the evidence was much more substantial than the prejudicial effect barred in *Robinson,* lending credence to the otherwise unsupported claim of the government that Easton "laced his pockets" with loan proceeds.

Given the tenuous proof of Easton's involvement in the crimes charged, the lack of jury unanimity, and the inflammatory nature of the prejudicial evidence, its admission clearly tainted the conviction.[23]

C. The Reception Of Alleged Financial Statements Of the Borrowing Corporations, Without Any Authentication, Was Further Error.

Numerous financial statements of the borrowing corporations, found in the files of the Chemical Bank, were admitted into evidence "subject to connection", over Easton's objec-

22. Easton's 1971 and 1972 net worth statements, received in evidence, did not reflect any receipt of loan proceeds.

23. It is anticipated that respondent will argue that the objection was waived at trial. However, the law is clear that a reviewing Court should rectify an error of such substance and prejudicial effect, even when no objection was taken. *See Johnson* v. *United States,* 318 U.S. 189, 200 (1943); *United States* v. *Modern Reed & Rattan Co., supra.*

tion. The statements were offered during the testimony of a Chemical employee, who admittedly knew nothing whatsoever regarding the authorship of the statements and although authorship of all but three was never established. Absent authentication, the statements were inadmissible.

F.R.E. Rule 901 sets forth the requirement of document authentication, a doctrine whose importance has been emphasized in the cases. *United States* v. *Blake,* 488 F.2d 101 (5th Cir. 1973); *United States* v. *Teague,* 445 F.2d 114 (7th Cir. 1971); *Cahn* v. *Nicholas,* 453 F.2d 528 (5th Cir. 1971).

Absent authentication, or proof that the financial writings were authored by one of the alleged co-conspirators, they were hearsay under F.R.E. Rule 801. Just as plainly, none of the exceptions to the hearsay rule were met and therefore admission was improper.[24]

Unquestionably, proof of the accuracy or inaccuracy of the financial statements of the corporate borrowers was a vital ingredient of the government's case. Equally clearly, admission of these financial statements, over objection, without authentication and given their hearsay quality, was an error of magnitude.

The overall effect of these material evidentiary errors must be viewed in the context of the Court's further improprieties with regard to the jury. These acts, considered cumulatively, raise the most serious questions as to the in-

24 The only potential exception was the "business records" exception, F.R.E. Rule 803(6). However, no proof was adduced that the writings satisfied the exception. Documents authored by persons not employed by the business whose records are offered do not fall within the rule. *United States* v. *Rosenstein,* 474 F.2d 705, 710 (2d Cir. 1973). The fact that the recipient, Chemical Bank, continuously maintained a file containing such matter is immaterial, especially since a Chemical officer conceded that no employee or agent of the Bank had written the statements. *See Rosenstein, supra; accord, Hussein* v. *Isthmian Lines, Inc.,* 405 F.2d 946 (5th Cir. 1968).

tegrity of a federal criminal trial and therefore raise a substantial issue as to whether Easton was deprived of due process, in derogation of the Fifth Amendment to the United States Constitution.

This Court, in the exercise of its supervisory jurisdiction,[25] has the ultimate obligation "to see that the waters of justice are not polluted". *Mesarosh* v. *United States,* 352 U.S. 1, 14 (1956). To paraphrase Chief Justice Warren, the government of the United States "does not need convictions" based upon dubious testimony. Indeed, "[i]t cannot afford to abide with them." *Id.*

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 26, 1978

25. *Cf., McNabb* v. *United States,* 318 U.S. 332, 340-41, *reh. denied,* 319 U.S. 784 (1943); *Thiel* v. *Southern Pacific Co.,* 328 U.S. 217 (1946).

APPENDIX

APPENDIX A

Judgment and Opinion of the United States Court of Appeals For the Second Circuit

Entered March 27, 1978

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 441, 443, 522—September Term, 1977.

(Argued December 14, 1977 Decided March 27, 1978.)

Docket Nos. 77-1243, -1258, -1285

UNITED STATES OF AMERICA,

Appellee,

v.

WILLIAM H. HOCKRIDGE, CHARLES PETRI and STEPHEN K. EASTON,

Appellants.

Before:

OAKES and VAN GRAAFEILAND, *Circuit Judges,* and BARTELS, *District Judge.**

Appeal from judgments of conviction entered after a jury trial in the United States District Court for the Southern District of New York, Dudley B. Bonsal, *Judge.* All three appellants were convicted of violating 18 U.S.C. § 371 under Count I and 18 U.S.C. §§ 656 and 2 under Count II. Petri was also convicted under 18 U.S.C. § 1014.

Judgments affirmed.

IRVING ANOLIK, New York, N.Y., *for Appellant Hockridge.*

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* Of the Eastern District of New York, sitting by designation.

Appendix A

ROBERT S. COHEN, LANS FEINBERG & COHEN, New York, N.Y. (Deborah E. Lans, New York, N.Y., of counsel), *for Appellant Easton.*

DANIEL J. KORNSTEIN, New York, N.Y., *for Appellant Petri.*

DOMINIC F. AMOROSA, Assistant United States Attorney (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, David W. O'Connor, Richard Weinberg, Assistant United States Attorneys, of counsel), *for Appellee.*

OAKES, *Circuit Judge:*

The principal issue raised in this appeal is the propriety of the district court's refusal to permit two jurors to impeach a partial verdict. Questions of sufficiency of the evidence with respect to appellant Hockridge, jury bias, adequacy of the conspiracy instructions, purported withholding of evidence by the Government, and erroneous evidentiary rulings are also presented, but each merits only limited discussion.

Appellants Hockridge, Petri and Easton challenge the judgments of conviction entered after an eight-week jury trial in the United States District Court for the Southern District of New York before Dudley B. Bonsal, *Judge.* Under Count One of the indictment all three appellants were convicted of conspiracy[1] (a) to misapply moneys of the Chemical Bank (Chemical), Hockridge's employer, (b) to prepare and submit false financial statements for the purpose of obtaining loans from Chemical and from

1 18 U.S.C. § 371.

Appendix A

the Bank of New York, and (c) to make false entries in Chemical's books and reports. They also were found guilty of a substantive count—Count Two—charging misapplication and assisting in the misapplication of approximately $1,145,000 in Chemical funds.[2] Petri, the owner of various shell companies and a borrower from Chemical, was also convicted of substantive Count Eight for preparing a false financial statement of the Oceanic Drug Co. for the purpose of influencing Chemical to loan $75,000 to that company.[3] Hockridge and Easton were acquitted on the Oceanic Drug count, as were all three appellants on Counts Three, Four, Ten through Fourteen, Seventeen, Twenty and Twenty-one. The jury was discharged on February 18, 1977, without having reached verdicts on the remaining counts.[4]

I. FACTS

From September, 1971, through the middle of June, 1972, Petri borrowed in excess of $1,300,000 from Chemical.[5] On over twenty occasions, loans were made to worthless corporations owned in whole or in part by a "mini-conglomerate" controlled by Petri known after November

2 18 U.S.C. §§ 656, 2.

3 18 U.S.C. § 1014.

4 On April 12, 1977, Hockridge was sentenced on Count One to nine months' imprisonment and on Count Two to a three-year suspended sentence with probation to commence upon his release from confinement. Petri was sentenced to four years' imprisonment on each of Counts One and Two and two years' imprisonment on Count Eight, all sentences to run concurrently. On June 15, 1977, Easton received six months' imprisonment and a fine of $5,000 on Count One. On Count Two his sentence was suspended and he was given three years' probation to commence following his release from confinement.

5 The $1,300,000 total does not include "roll-over" loans. Roll-over loans are those in which the proceeds of a new loan are used, at least in part, to pay off an old one.

24, 1971, as Cine-Prime Corp. Chemical ultimately lost over $1,100,000 on these loans.

Petri effected his scheme with the assistance of Hockridge who, as an assistant vice president and loan officer at Chemical, used his authority[6] to grant unsecured loans to Petri's corporations. Petri originally enticed Hockridge into the conspiracy by satisfying $35,000 in loans which the latter had previously approved to one Daniel Sheddrick.[7] Petri subsequently paid off $23,000 in overdue personal loans that Hockridge had approved to a codefendant, George Whitney. Petri also remunerated Hockridge more directly by diverting $14,000 of a $75,000 loan Hockridge had approved for one of Petri's companies to Hockridge's checking account in March, 1972.[8] Petri also provided Hockridge with other bribes and gratuities including, but not limited to, stock in Cine-Prime Corp. held by a nominee, a $3,000 mink coat for Hockridge's wife, sexual favors of a woman paid for the purpose, a pool table and gold clubs.

For all but two of the corporate loans approved by Hockridge, Easton, an officer in several of Petri's worthless companies, prepared unsigned corporate financial statements submitted to Chemical. Some of these listed non-

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6 The ceiling on his authority was $50,000 from September, 1971, to March 6, 1972, and then $75,000 from the latter date to June, 1972, when the scheme was discovered and Hockridge was dismissed.

7 The payment to Sheddrick is revealing. Hockridge approved a $75,000 loan to Oceanic Drug Co. and a $35,000 payment to Cord Automobile Co., two of Petri's companies. Hockridge removed $35,000 from the Oceanic checking account and deposited the moneys in the Cord account. A check was then drawn on the Cord account by Petri and Easton, payable to Sheddrick.

8 The $14,000 payoff was made when Hockridge authorized a $75,000 loan to Todays Stores Services, Inc. Hockridge then approved a $14,000 Chemical check payable to the Central Jersey Bank and Trust Co. where he maintained a bank account. He covered the Chemical check by withdrawing $14,000 from the Todays Stores Services' account.

existent assets. For example, Cord Automobile Co., acquired in bankruptcy for $100, was shown to have more than $260,000 in assets. One statement, that of Todays Stores Services, was dated even before the corporation was formed. Others were false in various particulars.

II. Discussion

A. *Sufficiency as to Hockridge*

Only Hockridge disputes the sufficiency of the Government's proof. Viewing the evidence in the light most favorable to the Government, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Falcone*, 544 F.2d 607, 610 (2d Cir. 1976), *cert. denied*, 430 U.S. 916 (1977), we conclude that the evidence supports Hockridge's conviction on both the conspiracy and the substantive counts.

The Government's proof at trial focused on four areas. First, the evidence permitted the jury to find that Hockridge knew that the financial statements submitted on behalf of Petri's corporations were false.[9] Second, the jury properly could have found that Hockridge completed false or fictitious documents in connection with several of the loans.[10] Third, the Government's proof demonstrated that Hockridge knowingly violated the bank's "group credits rule" by approving loans in excess of his credit authority to two or more corporations controlled by the same party without approval of other lending officers. And finally, Hockridge received the substantial bribes and gratuities

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9 He admonished one witness to "tell Petri and Easton to come down off some of these wild balance sheets."

10 On more than one occasion Hockridge falsely stated that certain loans would be used for working capital or for legitimate business investments when in fact the money was used to pay off personal loans or loans made to other companies.

detailed above.[11] Clearly, the evidence was more than sufficient.

B. *Alleged Jury Bias or Misconduct*

All three appellants assert that the jury was infected with prejudice before the deliberations even began. On the fifth day of an eight-week trial, Juror Number Three reported to the judge that several other jurors had remarked that the defendants were guilty. She noted, however, that the jurors were "not speaking about the case per se," whatever that meant. The district judge proceeded to interview each juror individually in camera. Several said that they had heard nothing of the kind, although six reported that someone had made a passing reference, in jest, to the subject of the defendants' guilt. Each averred that he or she would not form any opinion of guilt or innocence until all the evidence was presented. Each further recognized the necessity of not talking about the case.

In treating charges of jury misconduct, the trial judge is accorded broad discretion. *United States* v. *Panebianco*, 543 F.2d 447, 457 (2d Cir. 1976), *cert. denied*, 429 U.S. 1103 (1977); *United States* v. *Flynn*, 216 F.2d 354, 372 (2d Cir. 1954), *cert. denied*, 348 U.S. 909 (1955); *see* Note, *The United States Courts of Appeals: 1975-1976 Term Criminal Law and Procedure*, 65 Geo. L.J. 203, 370-71 (1976). A criminal trial is of course no place for bias or prejudice, even "in jest." And faced with the threat of bias, Judge Bonsal acted properly in conducting the in camera interviews. If one juror had been contaminated,

11 Hockridge's subsequent report to the bank that he had received no "gratuities, payments or secret benefits" from Petri or his group failed to mention the $14,000 payoff, *see* note 8 & accompanying text *supra*, and belied Hockridge's testimony that the transaction was really a loan from Petri to be used to buy stock.

the district judge's prompt action could have contained any spread of the taint. *United States* v. *Torres*, 519 F.2d 723, 727-28 (2d Cir.) ("expeditious" voir dire after defendants seen in handcuffs minimized harm where all jurors but one assured judge of continuing impartiality; unsure juror excused), *cert. denied*, 423 U.S. 1019 (1975); *cf. United States* v. *Lord*, 565 F.2d 831, 837-39 (2d Cir. 1977) (in camera individual interrogation of juror exposed to prejudicial publicity during trial required); *United States* v. *Pfingst*, 477 F.2d 177, 186 (2d Cir.) (individual jurors examined on exposure to prejudicial publicity), *cert. denied*, 412 U.S. 941 (1973); *but cf. United States* v. *Taylor*, 562 F.2d 1345, 1359-60 (2d Cir.) (omission to conduct individual voir dire where jury may have seen defendants in manacles not plain error), *cert. denied sub nom. Salley* v. *United States*, 97 S. Ct. 2958 (1977).

Likewise, on the basis of the jurors' interview statements, it was not an abuse of discretion to continue the trial upon concluding that the jurors were not prejudiced, a determination which the district judge was in the best position to make. *See United States* v. *Bando*, 244 F.2d 833, 838 (2d Cir.), *cert. denied*, 355 U.S. 844 (1957); *cf. United States* v. *Chiarizio*, 525 F.2d 289, 293 (2d Cir. 1975) (factual findings at pretrial suppression hearing are reversible on appeal only if clearly erroneous); 3 C. Wright, *Federal Practice and Procedure* § 678, at 143 (1969) (same).

C. *Juror Impeachment of Partial Verdict*

Appellants' principal contention is best understood in its specific factual context. The jury began deliberations on Friday morning, February 11, 1977, and continued until 9:30 that evening. Reconvening on Monday morning, February 14, it deliberated until about 6:30 p.m. when the

court informed counsel that it would exercise its prerogative under Rule 31(b) of the Federal Rules of Criminal Procedure[12] to ask the jury whether it had reached a partial verdict. The jurors responded affirmatively, announcing their verdict of guilty on Count One. After the jurors were polled, the guilty verdicts were recorded. Deliberations resumed on Tuesday, February 15. At about 5:00 p.m., the judge received a note from Juror Number Four asking to see him, a request with which he did not immediately comply. The following morning at about 9:30 a.m. he received a note from Juror Number Three. She also sought a meeting with the judge, fearing that she had committed "a grave injustice" by rushing into the verdict.

With consent of counsel, the judge conducted an on-the-record in camera interview with Jurors Three and Four. During the questioning both jurors expressed their concern with the partial verdict. Juror Number Three believed that

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12 Rule 31(b) provides:

> Several Defendants. If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

Fed. R. Crim. P. 31(b). In explicating Rule 31(b), Professor Wright states that

> the jury, at any time during its deliberations, may return one or more verdicts on those counts or defendants on which it is agreed. It may then retire again and resume its deliberations about the remaining charges [citing, *inter alia*, *United States* v. *Conti*, 361 F.2d 153 (2d Cir. 1966), *vacated and remanded on other grounds sub nom. Stone* v. *United States*, 390 U.S. 204 (1968)] . . . . In permitting the practice here described, Rule 31(b) is in accord with the prior law [citing, *inter alia*, *United States* v. *Frankel*, 65 F.2d 285 (2d Cir.), *cert. denied*, 290 U.S. 682 (1933)].

2 C. Wright, *Federal Practice and Procedure* § 513, at 366-69 (1969).

A guilty verdict may not be challenged on the basis that the jury is sent back for further deliberations on remaining counts after reaching a verdict on one or more counts. *United States* v. *Baruch*, 412 F.2d 28, 31-32 (2d Cir.), *cert. denied*, 396 U.S. 832 (1969); *McDonald* v. *Commonwealth*, 173 Mass. 322, 329, 53 N.E. 874, 875 (1899).

"there was not evidence to make [her] decide that Mr. Hockridge and Mr. Petri were involved in a conspiracy." Juror Number Four expressed doubts about Easton's guilt and indicated that she "felt like [at] the last minute we were railroaded. . . ."[13] The judge reminded the two jurors that he did not want them "ever to surrender [their] honest convictions." Juror Number Three replied that she thought she had done so "because of verbal attack." The judge urged her "to get hardened to that," to "think about this some more," and to consider each defendant separately. He then said:

> You did come in with a verdict on three of them. I would like you to think about that and resume your deliberations and then we'll see how it goes today with the deliberations and then perhaps after we finish here I will want to see you again.
>
> JUROR No. 3: I don't understand what you mean. Continue the deliberating—
>
> THE COURT: After the jury finishes, I think I will want to see you again and talk again about some of these things that you have told me this morning. But I think it would be wise if both of you could go back with the jurors.

The jurors then resumed deliberations and never again intimated any doubts of appellants' guilt on Count One. Indeed, they acquitted a codefendant on Count One that day. On Thursday, February 17, the jury announced its findings that the three appellants were guilty and a codefendant innocent on Count Two, and that all defendants were not guilty on Counts Three and Four. On the sixth

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13 She told the court that she had been "attacked incredibly" on the first day of deliberations but agreed with the judge that jury deliberations are often "emotional and high strung."

and last day of deliberations, Friday, February 18, the jury announced partial verdicts of not guilty as to all three appellants on nine more counts with the exception of Petri who was found guilty on Count Eight. The jury was discharged without reaching verdicts on the remaining counts even though there was no indication that it was deadlocked.

In response to formal post-trial motions to set aside the verdicts, Judge Bonsal held that the jurors' in camera interview statements could not affect their verdict on Count One. Alternatively, the judge concluded that the two jurors did not "surrender their honest convictions" in finding the appellants guilty on that count.

Challenging the district judge's adverse ruling, appellants argue vigorously that the statements of the jurors were competent to impeach the verdict on Count One for essentially two reasons. First, the jury had not been discharged, thereby making Rule 606(b) of the Federal Rules of Evidence[14] inapposite. Second, when a juror has surrendered "a conscientious conviction," the verdict must be set aside since it was not unanimous. *Grace Lines, Inc.* v. *Motley*, 439 F.2d 1028, 1032 (2d Cir. 1971); *see United States* v. *Pleva*, 66 F.2d 529, 531-33 (2d Cir. 1933); 6A *Moore's Federal Practice* ¶ 59.08[4], at 127-28 (1974).

14 Fed. R. Evid. 606(b) states:

> Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Neither the cases nor the treatises definitively answer the question whether Rule 606(b) bars the impeachment of a partial verdict by the voluntary and spontaneous testimony of a juror prior to the jury's discharge. In *Vizzini* v. *Ford Motor Co.*, 72 F.R.D. 132 (E.D. Pa. 1976), relied on by the Government, the jury returned a verdict of liability to a civil plaintiff which was recorded, but during deliberations on damages it revealed that the liability verdict was a compromise. The district court let the verdict on liability stand, relying on Rule 606(b), and submitted the question of damages to a new jury. The Third Circuit reversed, No. 76-2529 (3d Cir., filed Dec. 16, 1977), but reserved decision on the Rule 606(b) question, holding that the issues of liability and damages were so related as not to permit severability.[15] The appellants' cases are equally inconclusive.[16] Even the leading treatises

15 We note that the level of symbiosis between liability and damages that existed in *Vizzini* ordinarily would not pertain to partial verdicts on separate counts of an indictment.

16 In *United States* v. *Pleva*, 66 F.2d 529 (2d Cir. 1933), the conviction was reversed on appeal where a juror had informed the trial judge while the jury was being polled and before the verdict was recorded that he had voted for conviction because of his own illness. Here, of course, the jurors' statements were made *after* the verdict on Count One had been recorded. *Grace Lines, Inc.* v. *Motley*, 439 F.2d 1028 (2d Cir. 1971), is similarly unavailing. A juror's statement *on polling* that she had consented to the verdict in the interests of unanimity was insufficient to show surrender of an honest conviction. *Id.* at 1032 (Anderson, *J.*); *id.* at 1033-34 (Lumbard, *J.*, concurring). *See* 6A *Moore's Federal Practice* ¶ 59.08[4], at 130 (1974). Many cases in this circuit state the usual rule that jurors' statements received *after* discharge may not be received to impeach the verdict. *E.g.*, *United States* v. *Grieco*, 261 F.2d 414, 415 (2d Cir. 1958) (per curiam) (juror intimidated by "blustering arrogance" of another juror), *cert. denied*, 359 U.S. 907 (1959); *Rotondo* v. *Isthmian S.S. Co.*, 243 F.2d 581, 583 (2d Cir.) (post-discharge statements explaining reasons for verdict are incompetent), *cert. denied*, 355 U.S. 834 (1957).

ignore the relationship between Rule 606(b) and partial verdicts after which a jury continues its deliberations.[17]

To buttress appellants' purported distinction between impeachment of complete verdicts on the one hand and partial verdicts followed by continuing deliberations on the other, they suggest that the interests in protecting freedom of deliberation and freedom from post-verdict annoyance, embarrassment, or harassment are not implicated when the impeaching statements or incidents both occur and are inquired into by the court before the jury has been discharged.[18] Appellants' position, however, is defective for two reasons. First, it mischaracterizes the impeachment of partial verdicts as not implicating the jury's freedom of deliberation. And second, it overlooks another important interest served by the rule against verdict impeachment—verdict finality.

While the freedom of jury deliberations is less threatened by impeachment of partial verdicts than by impeachment of verdicts generally, it is, nevertheless, clearly impinged. The inquiry requested by appellants in this case is a prime example. It would have necessitated scrutiny of the deliberations of the jury including the mental processes of the jurors, a result inconsistent with

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17 *See* 6A *Moore's Federal Practice, supra* note 16, ¶ 59.08[4], at 123-52; 3 J. Weinstein & M. Berger, *Evidence* §§ 606[01]-[05], at 606-1-46; 8 Wigmore, *Evidence* §§ 2345-56 (McNaughton rev. ed. 1961); Wright, *supra* note 12, § 554, at 488-95; *The ABA Standards Relating to Trial by Jury* § 5.7 (Approved Draft 1968) [hereinafter ABA Standards].

18 Wigmore noted in a non-partial verdict context that "the dangers of uncertainty and of tampering with the jurors to procure testimony, disappear in large part if such investigation as may be desired is *made by the judge* and takes place *before the jurors' discharge* and separation." 8 Wigmore, *supra* note 17, § 2350, at 691 (emphasis in original). *See* ABA Standards, *supra* note 17, § 5.7(a), at 173. Wigmore points out, however, the danger of abuse from an overactive judge attempting to browbeat a jury out of its sincere conclusion, as in *Rex* v. *Shipley*, 21 How. St. Tr. 847, 950n, 951 (1784). Wigmore, *supra*, § 2350, at 692.

the strictures of Rule 606(b). The legislative history of Rule 606(b), while perhaps not determinative, reveals the strong congressional purpose of protecting the jury deliberation process. The House version embodied a suggestion of the Advisory Committee of the Judicial Conference to delete the proscription against testimony on "any matter or statement occurring during the course of the jury's deliberations," previously adopted by the Supreme Court. It retained the prohibition against inquiry into the mental processes of the jurors. *See* H.R. Rep. No. 93-650, 93d Cong., 1st Sess. 9-10 (1973). The Senate, however, thought any inquiry into internal deliberations of the jury unsound, and its report, citing *McDonald* v. *Pless*, 238 U.S. 264, 267 (1915), called for reinstatement of the proscription. S. Rep. No. 93-1277, 93d Cong., 2d Sess. 13-14 (1974). The Senate view ultimately prevailed. Similar considerations seemingly apply to a partial verdict; the policy against intrusion into internal deliberations remains the same. Furthermore, it must be assumed that in enacting the Federal Rules of Evidence Congress did not act in a vacuum, but rather had in mind the Federal Rules of Criminal Procedure, including Rule 31(b).

Appellants' position also fails to recognize the important interest in verdict finality which is furthered by Rule 606(b). Finality obviously would be enhanced by extending the rule against impeachment to partial verdicts which have been recorded. A partial verdict should be given final effect since "[i]t would only promote irresponsible hesitation to tell [the jury] that they must reserve their decision altogether until they got through; the appellants had no right in [the jury's] subsequent vacillations." *United States* v. *Cotter*, 60 F.2d 689, 690 (2d Cir.) (L. Hand, *J.*), *cert. denied*, 287 U.S. 666 (1932). The reason for taking a partial verdict is apparent in cases where there has been a long trial and there exists the prospect

of long deliberations. By taking a partial verdict, the court is able to hedge against the possibility of juror illness or death or prejudice by publicity. Of course, finality is not sought for its own sake. But where a partial verdict has been recorded, we perceive no reasons of sufficient magnitude to depart from the normal rules governing impeachment of jury verdicts.[19] A recorded partial verdict ought not to be disturbed absent a showing of the type which would permit impeachment of a complete verdict.

In this particular case Judge Bonsal entered into a discussion with the two jurors which to some extent implied that they might, along with the other jurors, reconsider the recorded verdict. To the extent that this may have been error, it was harmless.

After the in camera interviews with Judge Bonsal, the two jurors joined the others in verdicts of guilt and innocence on a number of counts. At no point did they again voice any reservation with respect to appellants' conviction on Count One. The appellants argue that Judge Bonsal's conduct in dealing with the two jurors had the effect of coercing them into giving up reasonable doubts they may have had about appellants' guilt in subsequent deliberations. This contention might have some merit if Judge Bonsal's in camera conduct had in any way been

19 A partial verdict still requires the affirmative act of assenting to a verdict either by express answer to the clerk at polling in open court or by silence which implies assent. *See* 8 Wigmore, *supra* note 17, § 2355, at 717. "The record of a verdict implies a unanimous consent of the jury, and is conclusive and incontrovertible evidence of the fact." *Grinnell* v. *Phillips*, 1 Mass. 529, 542 (1805). Although here there was no individual polling, none was requested. Appellants, therefore, waived the right. *See Humphries* v. *District of Columbia*, 174 U.S. 190, 194-95 (1899); *United States* v. *Dye*, 61 F. Supp. 457, 459 (W.D. Ky. 1945); ABA Standards, *supra* note 17, § 5.5; *cf. Hernandez* v. *Delgado*, 375 F.2d 584 (1st Cir. 1967) (no violation of due process to infer waiver of right to poll jury from silence).

coercive, but his management of this difficult and novel situation was the opposite of coercive.[20] We emphasize, however, that in the future the appropriate action of the trial judge faced with a similar request by a juror to reconsider a prior recorded partial verdict should be to advise the juror simply that such a verdict is final, avoiding the discussion engaged in here.

D. *Other Issues*

Appellants' remaining contentions require scant comment. Hockridge asserts that the Government failed to reveal an ongoing investigation of a "money-washing" operation in several Chemical branches in violation of *Brady* v. *Maryland*.[21] The inquiry centered on Chemical's failure to comply with federal currency requirements. How this entirely unrelated investigation would have tended to create a reasonable doubt of Hockridge's guilt is not demonstrated. Absent such a showing, no new trial is required. *United States* v. *Agurs*, 427 U.S. 97, 112-13 (1976).

20 Concededly, the district judge's directions to the two jurors were somewhat ambiguous. *Ante* at 2141. If he was urging the jurors to deliberate further on Count One, we believe that under the view we have taken of Rule 606(b)'s application to partial verdicts, the district judge exceeded his authority. Appellants could not complain of that error, however, since it was favorable to their position.

In any event, Judge Bonsal's instructions were clearly noncoercive. True, he did not discuss the matter further with the jurors, as he told them he would do. But there did not appear to be any need for additional communications as the jury deliberations progressed. Moreover, although appellants moved to set aside the verdict and for a mistrial when counsel were informed of the colloquy between the judge and the two jurors, no objection to the judge's failure later to discuss the verdict was ever lodged, nor did appellants ever request redeliberation by the entire jury on Count One. Accordingly, they would have to abide the result reached here even if the recorded partial verdict was not, by virtue of the trial judge's discussion with the two jurors, entitled to final effect.

21 373 U.S. 83 (1963).

Hockridge argues that the court failed adequately to explain to the jury the "thrust of the conspiracy count," Brief for Appellant Hockridge at 34, urging that he was at most a "casual facilitator," *id.* at 28. *See United States* v. *Hysohion*, 448 F.2d 343, 347 (2d Cir. 1971). We find that the judge's conspiracy charge[22] was proper under the authorities in this circuit[23] and that the evidence was clearly sufficient to implicate Hockridge as a participant in the scheme to defraud the bank.

Easton contends that the court improperly permitted proof of extraneous crimes committed by himself and Petri. Specifically the Government offered proof to show that Easton and Petri failed to withhold requisite taxes from corporate employees. However, this evidence tended to show how the conspiracy operated by suggesting that the Petri corporations were simply shells formed to obtain loans. As such the evidence was plainly admissible under Federal Rule of Evidence 404(b),[24] without creating undue

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22 The court charged that "a conspiracy is a combination or partnership, if you will, of two or more people to violate the law . . . ." It also charged that the Government must prove

> that at least two or more persons came to a mutual understanding for the purposes of accomplishing the unlawful plan or scheme described in the conspiracy count which I just read to you. Here, of course, the fact that the defendants knew each other or may have associated with each other or may have discussed mutual or common business interests, that isn't enough to establish a conspiracy. Mere association isn't enough.

23 *E.g.*, *United States* v. *Rosenblatt*, 554 F.2d 36 (2d Cir. 1977); *United States* v. *Kahaner*, 317 F.2d 459, 474-82 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963).

24 Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Fed. R. Evid. 404(b).

prejudice, confusion or waste of time so as to be excludable under Rule 403.[25]

Easton also complains that the Government was erroneously permitted to cross-examine him on the increase of his net worth by over $2,000,000 between 1972 and 1974. But he cannot complain now where he failed to object to this line of inquiry at trial. *United States* v. *Braunig*, 553 F.2d 777, 780 (2d Cir.), *cert. denied*, 431 U.S. 959 (1977). Moreover, there was proof that some of the Chemical loan proceeds were diverted to his personal checking account, although he denied this for the most part. Thus the Government could properly inquire into whether he had used Chemical money to finance personal business ventures which culminated in an increase in his net worth. *See United States* v. *Tramunti*, 513 F.2d 1087, 1105 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States* v. *Jackskion*, 102 F.2d 683, 684 (2d Cir.), *cert. denied*, 307 U.S. 635 (1939).

None of the other points raised by appellants merits discussion.

Judgments affirmed.

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25 Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 403.

APPENDIX B

Unreported Opinion and Order of the United States District Court for the Southern District of New York Entered April 13, 1977 Denying Motion by Defendants Hockridge and Petri to Set Aside Verdict

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Cr. 843

UNITED STATES OF AMERICA,

v.

WILLIAM HOCKRIDGE, *et al.*,

Defendants.

MEMORANDUM

BONSAL, D. J.

Prior to the sentencing of defendants William Hockridge and Charles Petri this day, the Court denied their motions and stated it would amplify its reasons for doing so in this Memorandum.

Defendants William Hockridge and Charles Petri move pursuant to Rule 33 of the Federal Rules of Criminal Procedure to have the Court set aside a jury verdict of guilty and grant them a new trial. Defendant Petri also moves pursuant to Rule 29 (F. R. Cr. P.) to have the

Court set aside the verdict and enter judgment of acquittal.

Defendants Hockridge and Petri contend: (1) that statements made by two jurors during an *in camera* interview conducted by the Court on February 16, 1977, the fourth day of jury deliberations, after the jury had returned a partial verdict of guilty on the conspiracy count, indicate that these jurors had not been convinced of the defendants' participation in the conspiracy beyond a reasonable doubt and had surrendered their conscientious convictions in acquiescing in the verdict of their fellow jurors; (2) that if the verdict on the conspiracy count is set aside, the verdict(s) of guilty on the substantive count(s) must also be set aside; (3) that the taking of a partial verdict on the conspiracy count was improper; and (4) that the Government improperly withheld from the defendants information that the Chemical Bank was under investigation.

In charging the jury that they should exchange views and that they should not be afraid to surrender their original views, the Court instructed the jury that they should never surrender their honest convictions for any reason whatsoever. The Court is satisfied that neither of the two jurors surrendered their honest convictions. *See United States* v. *Grieco*, 261 F.2d 414 (2d Cir. 1958), *cert. denied*, 359 U.S. 907 (1959).

The jurors who were interviewed were instructed to go back to the jury room and discuss their concerns with their fellow jurors. The next day they joined with their fellow jurors in finding the defendants Hockridge, Petri and Easton guilty on Count 2 (misapplication of funds), and the following day they found the defendant Petri

guilty on Count 8 (false statement). On each occasion the jurors were individually polled. Moreover, all the jurors joined in verdicts of not guilty on a number of the substantive counts. It is apparent therefore that the concerns of the two jurors interviewed were met by subsequent deliberations with their fellow jurors.

The Court also concludes that the taking of the partial verdict pursuant to Rule 31(b) (F.R.Cr.P.) with respect to the conspiracy count was proper under the circumstances. The Court had directed the jury to reach a verdict on the conspiracy count before deliberating on the substantive counts. The jury had deliberated for two days before they were asked if they had reached a verdict on any count. Since the purpose of taking a partial verdict is to avoid a costly and time-consuming retrial in the event that one of the jurors becomes incapacitated, it was in the interest of the defendants as well as the Government to ask whether they had reached a verdict on any count.

Nor were the defendants prejudiced by the "Pinkerton" charge. The Court made it clear that they *may* apply Pinkerton if they had found the defendant they were considering guilty under the conspiracy count. The fact that they found defendants Hockridge and Petri not guilty of a number of substantive counts, after finding them guilty on the conspiracy count, is a clear indication that the defendants were not prejudiced by the Pinkerton charge.

Finally, the defendants were not prejudiced by the alleged failure of the Government to disclose that the Chemical Bank was under investigation. This was clearly not relevant to the facts of this case.

For the foregoing reasons, the defendants' motions are denied,

It is so ordered.

Dated: New York, N.Y.
April 12, 1977

DUDLEY B. BONSAL
U.S.D.J.

APPENDIX C

Judgment

Judgment Entered June 15, 1977

UNITED STATES DISTRICT COURT
FOR SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

vs.

STEPHEN K. EASTON,

Defendant.

Docket No. 76 Cr. 843 DBB

JUDGMENT AND PROBATION/COMMITMENT ORDER

Counsel: In the presence of the attorney for the government the defendant appeared in person on this 6th month, 15th day, '77, with counsel William Sherr.

Plea: Not guilty.

Finding and Judgment: There being a verdict of guilty. Defendant has been convicted as charged of the offenses of unlawfully, wilfully and knowingly embezzle, abstract, purloin and wilfully misapply the moneys, funds and credits of the Chemical Bank and the moneys, funds and assets entrusted to the custody and care of said bank.

Title 18, U.S. Code, §§656 and 2.); conspiracy so to do. (Title 18, U.S. Code, §371.)

Sentence or Probation Order: The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of SIX (6) MONTHS on count 1 and FINED $5,000.00 on count 1. Fine is to be paid within 60 days or the defendant is to be committed until the fine is paid or he is otherwise discharged according to law.

Imposition of sentence on count 2 is suspended. Defendant is placed on probation for a period of THREE (3) YEARS, to commence upon expiration of confinement imposed on count 1, subject to the standing probation order of this Court.

Special Conditions of Probation: Defendant is continued on present bail for 60 days, at which time he is to surrender for service of sentence.

(SEAL)

By:

Clerk

Nos. 77-1539, 77-1770 and 77-6908

In the Supreme Court of the United States

OCTOBER TERM, 1977

STEPHEN K. EASTON, PETITIONER

v.

UNITED STATES OF AMERICA

WILLIAM HOCKRIDGE, PETITIONER

v.

UNITED STATES OF AMERICA

CHARLES PETRI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

JOHN C. KEENEY,
Acting Assistant Attorney General,

WILLIAM G. OTIS,
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INDEX

CITATIONS

Cases:

Statutes and rules:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A)[1] is reported at 573 F.2d 752. The opinion of the district court (Pet. App. B) is unreported.

[1] "Pet. App." refers to the appendix to the petition in No. 77-1539.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 1978. Petitions for rehearing (in Nos. 77-1770 and 77-6908) were denied on May 15, 1978. The petitions for a writ of certiorari were filed on April 26, 1978 (No. 77-1539), June 13, 1978 (No. 77-6908) and June 14, 1978 (No. 77-1770). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in refusing to set aside a partial verdict because two jurors expressed misgivings about their votes while the jury was still deliberating on additional counts.

2. Whether the trial court's interview with those jurors, undertaken with the consent of defense counsel, was improper or coercive (Nos. 77-1539 and 77-1770).

3. Whether the trial court erred in failing to poll the jury separately as to each defendant on the conspiracy count (Nos. 77-1539 and 77-1770).

4. Whether the trial court abused its discretion in admitting evidence of petitioner Easton's complicity in other crimes and of his financial condition (No. 77-1539).[2]

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[2] Hockridge's petition lists three additional "Questions Presented" (Pet. 3), but he does not discuss these points in his argument. Since these issues are adequately addressed in the court of appeals' opinion (Pet. App. A-5 to A-7, A-15), we will not discuss them here.

RULE INVOLVED

Rule 606(b), Fed. R. Evid., provides:

> *Inquiry into validity of verdict or indictment.* Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of misapplying the moneys and assets of a bank, and of conspiracy to do so, in violation of 18 U.S.C. 371, 656, and 2 (Pet. App. A-2 to A-3). Petitioner Petri was also convicted of preparing a false financial statement for the purpose of influencing the Chemical Bank to make a $75,000 loan, in violation of 18 U.S.C. 1014 (Pet. App. A-3). Petri was sentenced to four years' imprisonment on

each of two counts and two years on the final count, all sentences to run concurrently (Pet. App. A-3 n. 4). Petitioner Easton was sentenced to six months' imprisonment, fined $5,000, and placed on probation for three years (*ibid.*). Petitioner Hockridge was sentenced to nine months' imprisonment and placed on probation for three years (*ibid.*). The court of appeals affirmed in a thorough opinion on which we principally rely (Pet. App. A).

1. The evidence showed that petitioners conspired to defraud the Chemical Bank and the Bank of New York by means of a loan scheme based upon the submission to these banks of false corporate financial statements. Chemical Bank ultimately lost more than $1,100,000 on these loans (Pet. App. A-4).

In June 1971, petitioner Petri acquired a debt-ridden public corporation, Zavala-Riss Productions, which he subsequently renamed Cine-Prime Corporation (Tr. 1914-1954; 2089). Shortly after the purchase, Petri began to build a conglomerate by acquiring Comprehensive Sports Planning, Inc. (CSPI) with the promise that the stockholders of CSPI could exchange their shares for stock in Zavala-Riss (Tr. 1576-1581). At the time CSPI was acquired by Petri, petitioner Easton was CSPI's accountant and a minority stockholder (Tr. 1578). Shortly after the acquisition of CSPI, Easton agreed to be the accountant for Petri's emerging conglomerate in exchange for a salary plus a substantial amount of the stock in Zavala-Riss (Tr. 1583-1587).

Petri gained the support of petitioner Hockridge, then assistant vice president and loan officer of the Chemical Bank, by satisfying $58,000 in loans the latter had previously approved to third parties, and later by diverting to Hockridge's checking account $14,000 of a $75,000 loan Hockridge approved for one of Petri's companies (Pet. App. A-4). Petri also provided Hockridge with other bribes and gratuities, including a mink coat, golf clubs, and stock (*ibid.*).

From September 1971 to June 1972, Hockridge approved more than 20 unsecured corporate loans to companies controlled by Petri (Pet. App. A-3 to A-4). The rules of the Chemical Bank prohibited its loan officers from unilaterally approving loans in excess of $75,000 to two or more corporations controlled by the same party or parties (Tr. 539-543). To make it appear to bank officials that the loans approved by Hockridge were unrelated, Easton and Petri had a number of employees sign corporate promissory notes and corporate resolutions as officers of the various corporations within the conglomerate that were to receive loans from the bank (Tr. 639-675; 868-882; 1267-1304; 1352-1377; 1999-2004; 2174-2182; 2405-2425). Hockridge then prepared fictitious reports for the bank files indicating that before approving the loans he had spoken with corporate officers about the loans and their repayment.[3]

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[3] Numerous government witnesses testified that these representations that Hockridge had spoken to them were false (Tr. 639-675, 1036-1040, 1267-1304, 1406-1410, 2742-2757, 2719-2724, 2405-2425, 1943-1946, 2913-2916).

For all but two of the corporate loans approved by Hockridge at Chemical Bank, Easton prepared unsigned corporate financial statements which he and Petri submitted to Hockridge (Pet. App. A-4).[4] These financial statements grossly overstated the assets of the corporations on whose behalf loans were sought.[5] Hockridge was aware that these statements were false; on one occasion he told a government witness to warn Petri and Easton "to come down off some of these wild balance sheets" (Tr. 1035). Easton and Petri then manipulated the loan proceeds, paying off loans to one corporation with part of the proceeds of loans to others, in order to create the impression that the corporations making up the conglomerate were viable entities doing a substantial volume of business.

Easton was also instrumental in obtaining a $150,000 loan from the Bank of New York for Todays Stores Services, Inc., one of the companies in the conglomerate. Easton told a Bank of New York loan officer that he was the treasurer of Todays Stores and that the company was part of a group of businesses controlled by Cine-Prime Corporation. He

[4] Robert Fillet, who had been employed by Petri as a consultant, testified that Easton told him that he (Easton) was not concerned about the false statements that he had prepared because he had not signed them (Tr. 1637-1638).

[5] For example, Easton listed $261,800 in assets in the Cord Automobile Co. financial statement, and $189,918 in assets in the Talmadge Furniture Co. financial statement, when two months previously Petri had acquired all of the assets of both companies from the bankruptcy court for one hundred dollars (Tr. 1440-1450).

stated that the group did all its business at Chemical Bank, but that Cine-Prime Corporation was growing so rapidly that its banking relationships needed to be expanded (Tr. 3137-3138). After Easton submitted two false financial statements to the Bank of New York, it agreed to extend the $150,000 loan (Gov't. Exs. 26(f)(1), 26(f)(2); Tr. 3143, 3150). Some of the proceeds from this loan went to Easton, who received $2,500 plus an additional $15,000 that was used to pay off a Chemical Bank loan to his company, Tax by Telephone (Tr. 2540-2570).

2. The jury began its deliberations on Friday morning, February 11, 1977 (Pet. 7). It reconvened on Monday morning and continued deliberations. At the end of the day the district judge indicated that he intended to exercise his prerogative under Fed. R. Crim. P. 31(b) to ask the jury whether it had reached a partial verdict (Tr. 5897, 5900).[6]

In response to the court's inquiry, the jury announced a verdict of guilty as to Petri, Easton, and Hockridge on Count One, the conspiracy count (Tr. 5901-5902). The court then asked counsel if they wanted the jury polled; and although only counsel for Hockridge responded affirmatively, the jurors were asked whether they found all three defendants guilty on Count One. Each juror responded affirmatively, and the verdicts were recorded (Tr. 5902).[7]

[6] Petitioners did not object to the district court's decision to take a partial verdict, nor challenge the district court's authority to do so pursuant to Rule 31(b) (Tr. 5880-5901).

[7] At this time, petitioners made no request that the jury be individually polled as to each defendant (Tr. 5901-5902).

On Tuesday, February 15, at approximately 5:00 p.m., the judge announced that he had received a note from Juror Number Four asking to see him (Tr. 5909). After receiving the views of counsel, the court stated that he did not intend to interview Juror Four until the jury concluded its deliberations (Tr. 5909-5914). However, when the jury reconvened the next morning, the court received a note from Juror Number Three asking to see the judge and stating that she believed she had committed an injustice by rushing into a verdict (Tr. 5920).

With the consent of petitioners' counsel, the court conducted an *in camera* interview with Jurors Three and Four (Tr. 5921-5924). At the interview, the two jurors expressed misgivings about the verdict on Count One (Tr. 5928-5932). The court reminded the jurors that he did not want them to surrender their honest convictions because of other jurors, and he suggested that they resume deliberations and discuss their concerns with the other members of the jury. The judge also mentioned the possibility that the jurors could discuss the problem further with him later (Tr. 5927-5935).

Following the *in camera* interview, the court denied the motion by all defendants to set aside the verdict on Count One, and he also denied Easton's request to have the jury polled individually as to him on Count One (Tr. 5935-5942).

The next day, at approximately 2:00 p.m., the jury informed the court that it had reached verdicts on three additional counts (Tr. 5967-5968). The jury

found petitioners guilty on Count Two and acquitted them on Counts Three and Four (Tr. 5969-5970). The jurors were polled, and each agreed that this was his verdict (Tr. 5970). The following day after the jury announced partial verdicts on nine more counts,[8] the court discharged the jury and dismissed the remaining 11 counts (Tr. 5996-6001, 6021-6023). The court denied post-trial motions to set aside the verdict because of jury misconduct, refusing to permit petitioners to interview Jurors Three and Four because they could not impeach their own verdict, and holding that even if the two jurors' statements were to be considered in ruling on the motion, they had not surrendered their honest convictions in finding petitioners guilty on Count One (Tr. 6041-6046; Pet. App. A-18 to A-19).

ARGUMENT

1. Petitioners contend that the trial court erred in refusing to set aside the partial verdict or to order redeliberation after Jurors Three and Four expressed misgivings about their votes. They urge that since the verdicts on Count One were not unanimous, reversal is required.

a. Petitioners rely upon the statements of Jurors Three and Four to demonstrate the jury's lack of unanimity. These jurors stated that they had doubts about their verdict on Count One that had not been

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[8] Petitioner Petri was convicted on one additional count, and otherwise petitioners were acquitted on each of these counts (Tr. 5971-6021).

resolved and that they had been rushed into a verdict by pressure from the other jurors. The answer to this contention, however, is that the statements of the two jurors, reciting no *outside* influence and coming after the verdict on Count One had been rendered, confirmed by a poll of the jury, and recorded, were too late to impeach the result.

As the court of appeals correctly concluded, Fed. R. Evid. 606(b) explicitly forbids recourse to evidence of this nature in order to impeach a verdict. The Rule provides that "[u]pon an inquiry into the validity of a verdict * * * a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith * * *."[9] The focus of Rule 606(b) and its judicial antecedents is on the "insulation of the manner in which the jury reached its verdict, and this protection extends to each of the components of deliberation, including arguments, statements, discussions, mental and emotional reactions, votes, and any other feature of the process." Notes of the Advisory Committee on Proposed Rules, Fed.

[9] Rule 606(b) does not bar a juror's testimony "on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror." Petitioners do not contend that any such extraneous influence was exerted upon any juror.

R. Evid. 606(b), 28 U.S.C. App. (Supp. V), p. 2331. Forbidding inquiry into these matters is intended to encourage free and open discussion among the jurors, to promote the stability and finality of verdicts, to protect jurors against annoyance and embarrassment, to discourage jury tampering, and to prevent fraud by jurors. *McDonald* v. *Pless*, 238 U.S. 264, 267-269; *Mattox* v. *United States*, 146 U.S. 140, 148-149; *United States* v. *Eagle*, 539 F.2d 1166, 1170 (C.A. 8), certiorari denied, 429 U.S. 1110; *Government of the Virgin Islands* v. *Gereau*, 523 F.2d 140, 148-150 (C.A. 3), certiorari denied, 424 U.S. 917; *United States* v. *Green*, 523 F.2d 229, 235 (C.A. 2), certiorari denied, 423 U.S. 1074; Advisory Committee Notes, *supra*, Rule 606(b).

To be sure, petitioners argue that Rule 606(b) should not be applied where the jurors' statements were made before the jury had been finally discharged. But the distinction petitioners seek to draw is not supported by the language of Rule 606(b), which applies "[u]pon an inquiry into the validity of a verdict," not upon the discharge of the jury. See *Vizzini* v. *Ford Motor Co.*, 72 F.R.D. 132 (E.D. Pa.), vacated and remanded on other grounds, 569 F.2d 754 (C.A. 3).[10] Moreover, the policy considerations underlying

[10] Petitioner Petri urges (Pet. 13-15), notwithstanding the language of Rule 606(b), that as a general rule "the cut-off point for finality"—after which a juror's statements may not be received to impeach a verdict—is the time of the jury's discharge. An examination of the cases cited in support of this contention, however, reveals that although many hold that statements made after discharge are not admissible to impeach

Rule 606(b) are applicable to partial verdicts as well as to complete verdicts. Congress adopted the Senate version of Rule 606(b), which was based upon the view that any inquiry into the mental processes of the jurors would be undesirable. S. Rep. No. 93-1277, 93d Cong., 2d Sess. 13-14 (1974); H.R. Conf. Rep. No. 93-1597, 93d Cong., 2d Sess. 8 (1974). Indeed, inquiry into the jury's deliberations while the jury is still considering its verdict on additional charges may well be more intrusive than inquiry after the jury has been discharged. Rule 606(b) also serves the interest of ensuring the finality of verdicts. As the court of appeals recognized, partial verdicts are intended to give finality to a part of the case upon which the jurors have reached agreement. The partial verdict thus serves as a "hedge" (Pet. App. A-14) against the possibility that events during the course of long deliberations might require retrial of the entire case. Allowing the impeachment of partial verdicts whenever a juror has second thoughts frustrates the goal of giving final effect to that part of the litigation, and thus defeats the purpose of taking a partial verdict. As petitioner Petri recognizes (Pet. 16), this would render partial verdicts no more than "tentative, working hypotheses."

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the verdict, none deals with the situation where the juror's impeaching statements are made after the verdict is recorded but before discharge. These cases thus furnish no precedent for disregarding the express terms of Rule 606(b), which bar the admission of a juror's statements once a verdict has been recorded, *i.e.*, "[u]pon an inquiry into the validity of a verdict."

As the court of appeals correctly concluded (Pet. App. A-14), there were "no reasons of sufficient magnitude to depart from the normal rules governing impeachment of jury verdicts" simply because the verdict in the instant case was a partial one, and accordingly the statements of Jurors Three and Four were not admissible to impeach the verdict on Count One.

b. In any event, even if the jurors' statements are considered, the record supports the court's finding (Pet. App. A-10) that neither juror had "surrender[ed] [her] honest convictions," and thus the verdict on Count One represented the unanimous decision of the jurors. The trial judge had firsthand knowledge of the case, and he observed the two jurors when they were polled on each count, including the count about which they later expressed doubts. After the *in camera* interview, the jurors in question returned to their deliberations, and the trial judge had an opportunity to observe the interaction of the jury on the days that followed as they reviewed additional evidence and reached verdicts on one count after another. The day following the *in camera* interview, Jurors Three and Four joined the remainder of the jury in finding petitioners guilty on a second count, and neither of them expressed any doubts about this verdict when she was polled. The jury subsequently announced its verdict on 11 more counts, and in each instance Jurors Three and Four agreed with these verdicts when polled. They expressed no further doubts or concerns. Accordingly, even considering the

jurors' statements of their second thoughts, the record supports the trial judge's finding that both jurors had voluntarily assented to the jury's verdict on Count One.

Since the jury's verdict on Count One was unanimous, there was no ground for setting aside the verdict or ordering the jury to redeliberate on that Count.[11]

2. Petitioners Easton and Hockridge also contend that the court's *in camera* interview with the jurors was improper. First, they urge that the judge gave the jurors private instructions of the type disapproved in *United States* v. *Gullia*, 450 F.2d 777 (C.A. 3). To the contrary, however, the record demonstrates that the trial judge's comments to Jurors Three and Four were a far cry from the "additional instructions" in *Gullia*, where before any verdict had been recorded the court "instructed the juror, again and again, during the conference upon the meaning of 'aids, abets, counsels, commands, induces or procures,'" and responded to the juror's question about the effect of her holding out with the comment "'[i]t would mean that we have just wasted two weeks * * *.'" 450 F.2d at 778-779. Here, in contrast, the

[11] Petitioner Petri urges (Pet. 2) that this case presents the question whether the errors affecting Count One, the conspiracy count, also require reversal of the substantive counts, since the jury was instructed that members of the conspiracy could be found guilty of substantive crimes carried out in furtherance of the conspiracy (see Pet. 5). Since, as we have shown, the verdict on Count One was not defective, we need not reach this question.

in camera interview was devoted primarily to the judge's effort to learn the basis of each juror's concerns. The judge made no attempt to reinstruct the jurors: indeed, although Juror Three asked what constituted a reasonable doubt (Tr. 5931), the judge did not repeat his instructions on this point, or any other.

The record likewise provides no support for petitioners' related contention that the judge's comments during the interview were coercive and tantamount to an *Allen* charge on Count Two.[12] Before asking the two jurors to return to the deliberations, the judge reminded them that he did not want them to surrender their honest convictions, suggested that they get "hardened to" the fact that "Jurors disagree inevitably," and advised them to relax and "see how it goes today" (Tr. 5931-5932). As the court of appeals correctly concluded, this conduct "was the opposite of coercive" (Pet. App. A-15), and it bore no resemblance to an *Allen* charge.

3. Petitioners Easton and Hockridge next contend they were denied their right to have the jury polled on Count One separately as to each of them. How-

[12] Petitioners also suggest that the two jurors may have been coerced to give up their doubts on Count One. As the court of appeals correctly noted, the trial judge's suggestion that the two jurors raise their concerns about Count One with the other jurors was clearly not coercive, although under the court of appeals' construction of Fed. R. Evid. 606(b) it was error to suggest that the verdict on that count could be reconsidered (Pet. App. A-15 n. 20). That error, however, would favor rather than prejudice petitioner.

ever, although the court inquired whether any of the defendants wished to have the jury polled on Count One, neither requested that the jury be polled separately as to each defendant (Tr. 5902). Indeed, Easton did not request a poll at all. Since petitioners made no timely request, they cannot now complain that a single poll for the three defendants was insufficient. Fed. R. Crim. P. 31(d); *United States* v. *Marr*, 428 F.2d 614 (C.A. 7); *United States* v. *Neal*, 365 F.2d 188, 190 (C.A. 6).

4. Petitioner Easton contends (Pet. 30-35) that the district court erred in admitting evidence that petitioner characterizes as irrelevant and prejudicial. This contention is without merit.

a. Easton first argues (Pet. 30-32) that the district court improperly admitted evidence showing that he failed to withhold taxes from the paychecks he prepared for employees of corporations within the conglomerate. The answer is that evidence of other crimes, although inadmissible to prove the actor's criminal character or disposition, is admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed. R. Evid. 404(b).

The evidence in question was introduced to establish the fact—which the defense vigorously disputed —that corporations formed by Petri existed only on paper for the purpose of obtaining fraudulent loans from the Chemical Bank. Evidence showing that Easton failed to withhold taxes from "employees'" paychecks drawn on the accounts of these corporations clearly supported this inference, and was properly admitted as proof of the conspirators' fraudulent plan.

b. Easton also urges (Pet. 32-33) that the district court erred in allowing the government to elicit on cross-examination the fact that his net worth had increased by more than $2,000,000 from 1972 to 1974 (Tr. 5033). He contends (Pet. 32) that "[t]here was no evidence that [he] derived personal benefit from the loans made to the corporate borrowers," and charges that the government's purpose in introducing the irrelevant evidence of his increased net worth was to mislead and prejudice the jury. But the fact is that the government presented evidence showing that Easton had diverted loan funds to a personal checking account (Tr. 4890-4895). Moreover, a large part of the proceeds of the $1,100,000 loans petitioner and his co-defendants procured are still unaccounted for. In these circumstances, there was nothing improper in questioning Easton about whether he used some of this money to finance various business ventures that had significantly increased his net worth (Tr. 5003-5034). See *United States* v. *Tramunti*, 513 F.2d 1087 (C.A. 2), certiorari denied, 423 U.S. 832. In any event, Easton failed to object to this line of questioning, thus waiving the issue on appeal.

c. Easton also argues (Pet. 33-34) that the district court erred in admitting into evidence financial statements that he contends were not properly au-

thenticated and constituted hearsay. The contention that the financial statements were hearsay is without merit. Since the statements were not admitted as evidence of the truth of the matters reported therein (indeed the government sought to show they were false), they did not constitute hearsay. Fed. R. Evid. 801(c). His contention that the statements were not authenticated is equally unavailing, since there was ample evidence to establish they were what the government claimed—the statements submitted to Hockridge to justify loans to the Cine-Prime conglomerate. See Fed. R. Evid. 901(a). The statements were admitted as part of the corporate loan files of Chemical Bank (Tr. 116-117). Hockridge testified that these financial statements were the ones given him during the course of the conspiracy (Tr. 3542-3544). In any event, since Easton did not object to the admission of the documents on the ground they were unauthenticated, he has waived any objection he might have made.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1978.

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IN THE

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Respondent.

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FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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REPLY BRIEF FOR PETITIONER

Reply Statement of the Case

The Brief for the United States in Opposition ("U.S. Br.") to the petition of Stephen K. Easton ("Easton"), in order to shore up the Second Circuit's ruling of first impression on an issue of critical importance to our criminal jury system, contains inaccurate, material misstatements of fact designed to characterize Easton as the moving force behind the alleged conspiracy. Because of the significance of the legal issues raised—both as to Easton and to the bar in general—these material misstatements must be clarified.

1. The United States contends that Easton agreed to be accountant for Petri's "conglomerate in exchange for a salary plus a substantial amount of the stock in Zavola-Riss" (U.S. Br., p. 4, citation omitted). Easton was, *in fact,* only a part-time employee, receiving a "modest salary" far below that of even Petri's chauffeur (T. 1389, 1565, 1583-7). Numerous Petri employees, including secretaries, were promised stock (*e.g.,* T. 879-80, 996) but there is no evidence Easton ever received the promised securities.

2. The Government's statement that "Easton and Petri had a number of employees sign corporate promissory notes and corporate resolutions as officers of the various corporations" (U.S. Br., p. 5) in furtherance of the scheme ignores the testimony of Petri employees that it was Petri who appointed office personnel to corporate positions and obtained their signatures on promissory notes (T. 777, 871-2, 1206-7, 1320-3), that *Easton lacked authority* to act without Petri's approval (e.g., T. 1325; Easton Petition, pp. 12-13), and that Petri indeed inveigled even Easton into signing certain promissory notes (*e.g.,* T. 120-1).

3. Nor did Easton submit financial statements to Hockridge, of Chemical Bank, as contended (*compare* U.S. Br., p. 6, *with* T. 1208, 3543). The only financial statements Hockridge received, from or ever discussed with Easton, related to companies *not mentioned in the indictment* (T. 3542-5).

4. The charge that Easton prepared the financial statements (U.S. Br., p. 6) is *unsupported* by any record citation and, indeed, is belied by the fact that *Easton was acquitted on all counts of the indictment charging* the preparation of false financial statements, which were determined by

the jury.* The related claim that Easton submitted false financial statements to the Bank of New York concerning Today Store Services is similarly disproven by the *jury's acquittal of Easton on counts 13 and 14 of the indictment,* which charged such misconduct, together with the declaration of a mistrial as to the remaining counts relating to that corporation.**

5. Finally, the government *offered no record support* for the claim that Easton in any way assisted Petri in manipulating loan records (U.S. Br., p. 6).

Again, but this time in an attempt to give credibility to the major defects and improprieties in the jury's deliberation, the government's statements concerning the evidence of jury misconduct are also without basis in the record. It is implied Easton waived his objection to the manner in which the poll was conducted (U.S. Br., p. 7). The trial judge, however, obviously for efficiency purposes, determined during the course of the trial that an objection by one counsel (counsel for the lead defendant requested the poll (U.S. Br., p. 7)) would apply to all defendants. Even prior to submission of the case to the jury, Easton requested the preparation of a verdict sheet listing each defendant separately as to each count, which request was refused

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* The Circuit Court found to the contrary in its opinion (A. 4). That erroneous statement in the Court's opinion is also made without citation to any supporting material in the record.

** The United States repeats in its submission the testimony of its witness Burke—who had been promised immunity from prosecution—as purported proof of Easton's authorship of some, unidentified financial statements. Burke's hearsay testimony, admitted over objection, was that Hockridge allegedly made a statement to Burke which indicated Hockridge's belief that Easton had authored some financial statements (T. 1040-45). It was plain error to admit the testimony.

(T. 5479).* Indeed, an objection was made to the taking of a partial verdict (*compare* U.S. Br., p. 7 n. 6, *with* T. 5961-2).

ARGUMENT

I.

Because juror revelations of coercion and want of unanimity were made prior to the jury's discharge, Rule 606(b) of the Federal Rules of Evidence is inapplicable and the judgment must be reversed.

A. Rule 606(b) Is Inapplicable.

The government argues that to have received evidence of coercion and want of juror unanimity would have contravened Rule 606(b) of the Federal Rules of Evidence ("F.R.E."). However, because that rule had been interpreted prior to the decision below, exclusion of such evidence would only be warranted if—and after—the jury had been discharged. Never, prior to the Circuit Court's decision in this matter, has the rule been held applicable to bar substantial evidence volunteered prior to jury discharge but after a partial verdict has been taken (*see* Easton Petition, pp. 16-20).

The interest in verdict finality, advacned to justify extension of F.R.E. Rule 606(b) to partial verdicts (U.S. Br., p. 12), is illusory because finality as a goal cannot exist independently of the other values protected by the Rule

* The fact that no request was made for the jurors to be polled as to each defendant cannot be deemed to foreclose this Court's review of the polling procedure, in view of the fundamental character of the error and the Court's earlier refusal to provide a verdict sheet listing each defendant separately. *Johnson* v. *United States*, 318 U.S. 189, 200 (1943).

(Easton Petition, pp. 18-19). Plainly, those other goals—protection of jurors from harassment and discouragement of jury tampering—are unaffected by confinement of F.R.E. Rule 606(b) application to evidence obtained post-discharge as inquiries may be made prior to discharge by the Court. 8 Wigmore, *Evidence* § 2350, at 691 (McNaughton ed. 1961); 6A Moore's *Federal Practice* ¶ 59.08[4], at 59-143 (2d ed. 1974).

Nor will grant of the instant petition and reversal of the judgment render all partial verdicts merely "tentative, working hypotheses" (U.S. Br., p. 12). Rather, such verdicts will be subject to challenge only upon restricted grounds in those instances where jurors volunteer substantial evidence of misconduct which evidence is sufficient to warrant either requiring the jury to re-deliberate, as the District Court instructed Jurors Three and Four at bar (but not the entire jury), or requiring a new trial.

Finally, and in any event, where evidence is offered to prove the verdict was not unanimous, such evidence has repeatedly been held admissible. *Fox* v. *United States*, 417 F.2d 84, 89 (5th Cir. 1969); *cf.*, *Grace Lines, Inc.* v. *Motley*, 439 F.2d 1028 (2d Cir. 1971).

B. The Evidence Volunteered by the Jurors Mandates Reversal.

The assertion that the subsequent verdict finding Easton guilty on Count Two of the indictment validates the District Court's finding, expressed as to Hockridge's and Petri's motions only, that the jurors did not surrender their honest convictions of Easton's innocence, ignores completely the following: (1) the coercive effect of the Court's private instruction to Jurors Three and Four, (2) the fact that Jurors Three and Four had been promised an interview with the Court prior to discharge to review

the events surrounding the Count One conviction, and (3) Juror Three's forthright declaration that she had indeed surrendered her honest conviction (T. 5931; Easton Petition, pp. 25-28).

The Circuit Courts have repeatedly held that evidence of lack of unanimity requires reversal (*see* Easton Petition, pp. 21-22). Such evidence was volunteered before the District Court and there is no justification for dismissing the two jurors' own statements in that connection as untrue, as the District Court apparently did.

II.

The events surrounding the return of Jurors Three and Four to deliberations created a coercive environment for further deliberations.

The interview of Jurors Three and Four was inevitably apparent to the jury as a whole; the interview occurred after the Court had reconvened on February 16, 1977 (T. 5920-8). The jury was also aware, of course, that Jurors Three and Four had dissented from the Count One verdict (T. 5928-34). Following the private interview, Jurors Three and Four were sent to resume deliberations and instructed to raise anew their points concerning Count One with the jury (T. 5932-4). The jury as a whole never received corresponding instructions.

Under circumstances, it must be concluded that the jury as a whole felt immune from criticism for its coercive behavior.* It must also have felt the weight of the Court

* This is particularly so since, in the case of the jury's prior misconduct, the Court privately interviewed each juror and cautioned each against further misconduct (T. 688-727).

behind its substantive views, since the court never instructed it to re-deliberate.

Coincidentally, Jurors Three and Four must have also believed their expressed concerns were insubstantial as the Court's comments to the two jurors sought to minimize their concerns. For example, the Court characterized Juror Three's statements as evidencing "an emotional problem" (T. 5931).

The total effect of these events was of like impact to an improperly-given *Allen* charge (see Easton Petition, pp. 26-27). Hence, the Count Two conviction must be reversed.

III.

The reception of evidence as to unrelated crimes and hearsay evidence which was never authenticated denied Easton a fair trial.

A. Evidence of Easton's Failure to Withhold Taxes Was Without Probative Value.

The government's contention that evidence of Easton's knowledge that taxes were not withheld from salaries paid to Petri corporation employees was some proof of the government's claim that the corporation existed merely on paper (U.S. Br., pp. 16-17) is simply silly. Were the corporations shells or fictions, no salaries would have been paid. Moreover, there are a multitude of reasons why corporations fail to withhold taxes other than an intent to defraud third parties. In short, this inflammatory evidence did not even have "possible worth," let alone "real probative value," on the issue of intent, *Morgan* v. *United States*, 355 F.2d 43, 45 (10th Cir.), *cert. denied*, 384 U.S. 1025 (1966), and its admission mandates reversal.

B. Admission of the Hearsay and Unauthenticated Financial Statements Upon Which the Jury Obviously and Heavily Relied, Substantially Prejudiced Easton.

Easton repeatedly objected to the admission of the financial statements on the dual grounds the statements were hearsay and were not authenticated (*compare* T. 740-1, 3365-8, *with* U.S. Br., p. 18).

The government contends the statements were properly authenticated by virtue of evidence that these were statements given Hockridge by Petri and found in the loan file of Chemical Bank (U.S. Br., p. 18). However, the fact that the statements were ultimately found in Chemical Bank's files does not provide proper authentication, as it was conceded the statements were not authored by any Chemical Bank employee and no proof of authorship was made. *U.S.* v. *American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 192-94 (3rd Cir. 1970), *cert. denied*, 401 U.S. 948 (1971).

Nor can the concededly hearsay character of the records be overlooked, because the statements were offered for their falsity, not their truth (U.S. Br., p. 18). It is clear that an out of court statement may not be admitted for its substantive content, true or false, or as substantive evidence, absent some exception to the hearsay rule. *See, United States* v. *Plum*, 558 F.2d 568, 572 (10th Cir. 1977); *United States* v. *Tavares*, 512 F.2d 872 (9th Cir. 1975). Thus, in *Culwell* v. *United States*, 194 F.2d 808 (5th Cir. 1952), a prosecution for subornation of perjury, it was held prejudicial error to inquire of a witness whether her prior statements were true *or* false.

As the government concededly offered the financial statements specifically as proof of their substantive content, and

because the jury apparently gave substantial consideration to the documents, as by calling for them during deliberations (T. 5880-3), the admission of the financial statements was prejudicial error.

CONCLUSION

The petition for a writ of certiorari should be granted and, upon review, the judgment, convicting Easton upon Counts One and Two of the indictment, should be reversed.

Respectfully submitted,

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